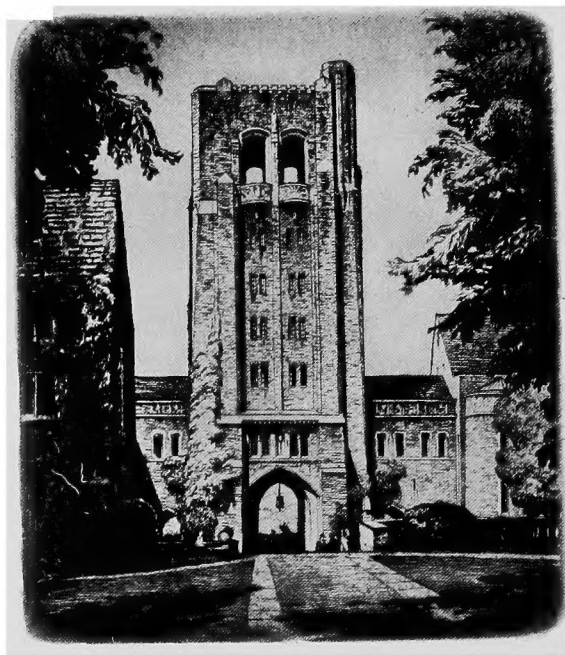


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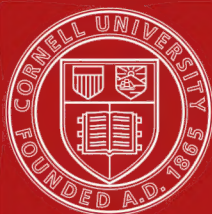
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A TREATISE
ON THE
LAW OF MORTGAGES
ON
PERSONAL PROPERTY.

BY
LEONARD A. JONES,
AUTHOR OF TREATISES ON "MORTGAGES," "RAILROAD SECURITIES," "PLEDGES," AND "LIENS."

THIRD EDITION,
REVISED AND ENLARGED.

BOSTON:
HOUGHTON, MIFFLIN AND COMPANY.
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1888.

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To
THE HONORABLE JOHN LOWELL, LL. D.,

JUDGE OF THE CIRCUIT COURT OF THE UNITED STATES,

This Treatise

IS RESPECTFULLY DEDICATED

BY

THE AUTHOR.

NOTE TO THE THIRD EDITION.

THIS work has been revised in the present edition by incorporating into the text and notes the new decisions that have been published since the second edition was prepared. The book has thus been enlarged by the addition of some sixty pages of new matter. Most of this has been wrought into the sections as they were originally formed, which retain the same numbers; and only a few wholly new sections have been written for the treatment of new subjects. Almost every section has received some addition, either in the text or in the notes. The number of cases cited has been increased by about eight hundred.

L. A. J.

BOSTON, *October 1*, 1888.

PREFACE.

THE present volume naturally follows the treatises which I have heretofore published upon Mortgages of Real Property and upon Railroad Securities. It completes the consideration of the general subject of Mortgages. The nature of personal property, as distinguished from real, is the foundation of broad distinctions between mortgages of the former and of the latter; and these distinctions extend through all the principal divisions of the subject. In many particulars, however, the same rules and principles of law are as applicable to mortgages of the one species of property as to those of the other. Wherever this is the case I have referred to my former works, both to show that the same rule applies to mortgages of real property and to call attention to a fuller statement — which may sometimes be found in them — of the point and the authorities upon it. I have thus, except in rare instances, avoided all occasion for citing in the present treatise cases which relate to mortgages of real property; and I have thus saved space which has been devoted to examining, more at length than otherwise would have been practicable, disputed and doubtful questions in the law of Chattel Mortgages. Of such disputed and doubtful questions there are many in the law of this subject; and

PREFACE.

some of them are of great difficulty. The matters, therefore, which are peculiar to the law of Chattel Mortgages have been fully considered, while those which are common to this law and to that of Mortgages of Real Property have been passed over with a briefer statement, and a reference to my volumes on that subject.

I have regarded these volumes upon different phases of the subject of Mortgages as constituting in fact one work covering the whole subject ; and I have, therefore, referred from one treatise to another as freely as I would to other sections of the same treatise. It is my purpose to follow this method still further, in the preparation of two other treatises, — one upon Pledges, including Collateral Securities, and one upon Liens, — which, with those I have already published, will form a complete series of works on Property Securities. The three forms of security upon property — Mortgages, Pledges, and Liens — will then be treated in works which are not only separately complete, but which will also have reference to the relations of the subjects to each other.

There seems to be an advantage in writing upon all the different branches of a general subject, or in writing upon subjects of a kindred nature ; for an author has thus an opportunity to note agreements and disagreements in the law applicable to them, and to observe the reasons for such agreements and disagreements. So far as he is able to do this, and to state the relations of the different topics to each other, and the modifications of general principles of law as they are applied under different circumstances, he does something to promote an orderly and rational

PREFACE.

development of the law. It has been with a hope that I might accomplish something in this direction, and at the same time provide for the profession books of a practical nature which should be useful in the business of every day, that I have undertaken and carried forward the preparation of this series of works upon kindred topics.

L. A. J.

Boston, *May 2*, 1881.

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THE LAW OF MORTGAGES

OF PERSONAL PROPERTY.

CHAPTER I.

NATURE OF MORTGAGES OF PERSONAL PROPERTY.

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I. A Legal Mortgage.

1. **In General.** — A formal mortgage of personal property is a conditional sale of it as security for the payment of a debt or the performance of some other obligation. The condition is that the sale shall be void upon the performance of the condition named. If the condition be not performed according to its terms, the thing mortgaged is irredeemable at law, though there may be a redemption in equity, or by force of statute.

Such a mortgage is something more than a mere security. It is a conditional sale of chattels, and operates to transfer the legal title to the mortgagee, to be defeated only by a full performance of the condition. Upon breach of the condition the mortgagee may take possession of the property, and, so far as the legal rights of the parties are concerned, he may thenceforth treat it as his own; he may sell it or give it away; squander it or destroy it.¹

¹ Porter v. Parmlly, 43 How. (N. Y.) Pr. 445; S. C. 2 J. & S. (N. Y.) 398; Tompkins v. Batie, 11 Neb. 147, 151; Mitchell v. Roberts, 17 Fed. Rep. 776; Levi v. Legg, 23 S. C. 282; Korman v. Henry, 32 Kans. 49.

In this respect a mortgage of personal property is like a mortgage of real estate under the old common law, but differs widely from a mortgage of real estate, as the latter has gradually come to be viewed within the past half century in nearly half the states and territories of the United States; for while in these states such a mortgage is regarded as conferring no legal title upon the mortgagee, but as being a mere lien or security, in these same states almost without exception, and everywhere else, a mortgage of personal property is regarded as not being a mere security, but as passing the legal title, which becomes absolute in the mortgagee upon default.¹

To constitute a legal or technical mortgage it is not essential that the condition should be inserted in the bill of sale itself; it may be written at the end of the instrument,² or indorsed upon it; or it may be contained in a separate paper executed and delivered simultaneously with the absolute bill of sale.

Any words which serve to transfer the property as security for a debt or obligation of any kind are sufficient to constitute an informal mortgage, which will still be a mortgage at law. Whatever language may be used, if it shows that the parties intended a sale of chattels as security, the instrument will be construed to be a mortgage.

2. At common law a valid mortgage of personalty may be made without writing. This results from the established principle that at common law a valid sale or transfer of personal property need not be in writing; save only in case there is no delivery of the property and the value of it is fifty dollars or more, there must be a writing to satisfy the statute of frauds. Except therefore so far as a mortgage is required to be in writing to satisfy the statute of frauds, or a statute requiring the recording or filing of the mortgage, a verbal mortgage is still valid.³ But in

¹ See §§ 699-712; Jones on Mortgages, §§ 1-59; Marseilles Manufacturing Co. v. Morgan, 12 Neb. 66, 69; Nelson v. Garey, 15 Neb. 531, 535; Kellogg v. Olson, 34 Minn. 103; Simonds v. Pearce, 31 Fed. Rep. 137; Fletcher v. Neudeck, 30 Minn. 125; Woodward v. Republic F. Ins. Co., 32 Hun (N. Y.), 365, 372; Levi v. Legg, 23 S. C. 282; Reese v. Lyon, 20 S. C. 17, 20.

In a few states no title or interest in

mortgaged chattels passes by the mortgage, except a lien, until it is foreclosed. **Dakota Territory:** Keith v. Haggart (Dak.), 33 N. W. Rep. 465. **Georgia:** § 12. **Oregon:** Knowles v. Herbert, 11 Oreg. 240. **Washington Territory:** Byrd v. Forbes (Wash. T.), 13 Pac. Rep. 715.

² Kent v. Allbritain, 4 How. (Miss.) 317; and see Jones on Mortgages, § 69.

³ **Alabama:** Morrow v. Turney, 35 Ala.

almost every state there are statutes requiring the recording or filing of a chattel mortgage, in order to render it valid against creditors of the mortgagor, or his subsequent purchasers or mortgagees, unless the property be delivered to, and retained by, the mortgagee. In the latter case the delivery of the property being made without writing to a creditor for the purpose of securing a debt, the transaction would ordinarily be a pledge.¹ Therefore it is not often that a verbal mortgage comes under consideration in court; and when it does, the contention is almost necessarily one between the parties themselves.

The only distinction between a verbal mortgage and a pledge of a chattel is that in the one case title to the property passes to the creditor, while in the other the title remains in the debtor, the creditor having only a lien upon it. A delivery of property as security constitutes a pledge; but, to constitute a mortgage, there must be a sale or transfer of the property upon condition.²

Thus under a verbal agreement between a debtor and his surety upon a note given for a yoke of oxen, that the cattle should be considered the property of the surety until the debtor should pay his note, the oxen were delivered to the surety and retained in his possession. The transaction was held to be a verbal mortgage.³

Delivery is not indispensable as between the parties under a verbal mortgage, any more than it is under a written mortgage.⁴

3. A parol agreement to give a mortgage, upon which money has been advanced, may be enforced in equity as between the parties and their representatives, on the principle that equity will

131; *May v. Eastin*, 2 Port. 414, 422; 433. **Kansas**: *Weil v. Ryms*, 18 Pac. Rep. Deshazo v. Lewis, 5 St. & P. 91, 94; 524; *Bates v. Wiggin*, 37 Kans. 44; 14 Brooks v. Ruff, 37 Ala. 371; *Shelburne v. Pac. Rep.* 442. **Other Cases**: *Flory v. Letsinger*, 52 Ala. 96; *Bickley v. Keenan*, 60 Ala. 293; *Thrash v. Bennett*, 57 Ala. 156; *Alabama Warehouse Co. v. Lewis*, 56 Ala. 514; *Stearns v. Gafford*, 56 Ala. 544; *Brown v. Coats*, 56 Ala. 439; *Rees v. Coats*, 65 Ala. 256; *Glover v. McGilvray*, 63 Ala. 508; *Burns v. Campbell*, 71 Ala. 271. **New York**: *Bank of Rochester v. Jones*, 4 N. Y. 497; *Ferguson v. Union Furnace Co.* 9 Wend. 345; *Ackley v. Finch*, 7 Cow. 290; *Ceas v. Bramley*, 18 Hun, 187; *Bardwell v. Roberts*, 66 Barb. 512. **Tenn.** 462; *McCoy v. Lassiter*, 95 N. C. 88, 91; *Sparks v. Wilson*, 22 Neb. 112.

¹ Jones on Pledges, §§ 5, 13.
² *Beeman v. Lawton*, 37 Me. 543.
³ *Bardwell v. Roberts*, *supra*.
⁴ *Morrow v. Turney*, 35 Ala. 131; *Bates v. Wiggin*, *supra*. See, however, *Bardwell v. Roberts*, *supra*.

consider that as done which ought to be done.¹ But the party seeking to establish such an agreement must prove its existence by clear and convincing evidence. Casual and indefinite expressions will not suffice.² Of course such an agreement is of no validity as against creditors and *bonâ fide* purchasers without notice.³

II. *Distinguished from a Pledge.*

4. The chief distinction between a mortgage and a pledge is that by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition; while by a pledge, the pledgor retains the general title in himself, and parts with the possession for a special purpose.⁴ By a mortgage the title is transferred; by a pledge, the possession. It often happens that there is a union in the same transaction of both forms of security; that there is a mortgage by virtue of a transfer of the title, and a pledge by virtue of a delivery of possession. Thus when bills and notes are transferred to a creditor by way of collateral security, his possession of them gives them the character of a pledge. Their indorsement if payable to order, or their delivery if payable to bearer, gives him the title also, which is something more than a pledge.⁵ And so it often happens that a constructive delivery of chattels cannot be effected without doing what amounts to a transfer of the property also. The assignment of a bill of lading is of this kind. Such an assignment is necessary, where a pledge is proposed, in order to give the constructive possession required to constitute a pledge; and yet it formally transfers the title also.⁶ In like manner an

¹ *Morrow v. Turney*, 35 Ala. 131; *Coster v. Bank of Ga.* 24 Ala. 37, 60; *Glover v. McGilvray*, 63 Ala. 508; *Conchman v. Wright*, 8 Neb. 1; and see *Jones on Mortgages*, §§ 163-171.

² *Shelburne v. Letsinger*, 52 Ala. 96.

³ *Conchman v. Wright*, *supra*.

⁴ *Jones on Pledges*, § 7. **Massachusetts**: *Walker v. Staples*, 5 Allen, 34, per *Chapman, J.* **Vermont**: *Conner v. Carpenter*, 28 Vt. 237; *Wood v. Dudley*, 8 Vt. 430, per *Phelps, J.*; *Gifford v. Ford*, 5 Vt. 532. **New York**: *Brown v. Bement*, 8 Johns. 96; *White v. Cole*, 24 Wend. 116. **Tennessee**: *Barfield v. Cole*, 4 Sneed, 465. **California**: *Wright v. Ross*, 36 Cal. 414;

Heyland v. Badger, 35 Cal. 404. **Michigan**: *Tannahill v. Tuttle*, 3 Mich. 104, 110. **North Carolina**: *Doak v. Bank of the State*, 6 Ired. L. 309; *McCoy v. Lassiter*, 95 N. C. 88. **Alabama**: *Campbell v. Woodstock Iron Co.* 3 So. Rep. 369; *Jackson v. Rutherford*, 73 Ala. 155; *Sims v. Canfield*, 2 Ala. 555. **Indiana**: *Evans v. Darlington*, 5 Blackf. 320; *Jordan v. Turner*, 3 Ib. 309. **Maine**: *Eastman v. Avery*, 23 Me. 248; *Beeman v. Lawton*, 37 Me. 543; *Day v. Swift*, 48 Me. 368.

⁵ *Jones on Pledges*, § 9.

⁶ *Casey v. Cavaroc*, 96 U. S. 467, 477, per *Bradley, J.*, substantially in his language.

assignment of a mortgage, of a policy of insurance, or of any chose in action, as security, may be either a pledge or a mortgage according to the intent of the parties.¹ Whether it be one or the other, the purpose of the instrument is the same, — to secure the payment of money, or the performance of some act by the maker of the instrument, or by some one else, for whom he undertakes. The importance of determining whether the transaction be a pledge or a mortgage arises from consequences resulting from the instrument being the one or the other: the title to the property in the former case remaining in the debtor both before and after breach of the condition; and in the latter case the title being all the while in the creditor, and becoming absolute in him at law after the debtor's default.

5. An assignment of a note and mortgage made essentially in the form of a mortgage of such securities will be regarded as a mortgage rather than a pledge or trust. Thus an assignment which contains both an absolute grant or assignment of the securities and a defeasance in the usual form is a mortgage of them, and it is not made a pledge or assignment in trust by reason of containing a provision immediately following the defeasance, that the instrument is "made for the purpose of securing the payment of the sum of thirty thousand dollars, with interest as aforesaid, and for no other purpose whatever." Whether it be construed to be a pledge, a mortgage, or an assignment in trust, these words would have equal significance, and would be equally true as applied to the transaction. But without the aid of these words the whole instrument establishes clearly that it was intended only as a security, and for "no other purpose whatever."² This provision, therefore, can have no significance in determining the character of the instrument. A recital in a mortgage that it is intended only as a security is not unusual, though it is superfluous when there is either a formal or substantial defeasance.³

¹ *Wright v. Ross*, 36 Cal. 414, 442, per Crockett, J.; *Tyler v. Strang*, 21 Barb. (N. Y.) 198.

² *Wright v. Ross*, *supra*; *Piper v. Hilliard*, 52 N. H. 209; *S. C.* 58 N. H. 198. In this case the property was stock in a corporation. See *Manns v. Brook-*

ville Nat. Bank, 73 Ind. 243, also a mortgage of shares in a corporation.

³ *Wright v. Ross*, *supra*, per Crockett, J. In this case the court were also fortified in the opinion that the instrument was intended as a mortgage by the fact that it was so denominated by the parties, by

A transfer of a note and mortgage of real property to indemnify a surety, he agreeing to retransfer them when indemnified, has been regarded as a conveyance in trust, upon the supposition that the only alternative was to regard it as a legal mortgage of a chattel; and it was objected that it could not be a legal technical mortgage because it contained no condition, and was not accompanied by a separate defeasance by the force of which the title would revert in the mortgagor upon the performance of the condition.¹

Generally a transfer of a note, or bill of lading, or mortgage, or other chose in action, as collateral security for a debt, is now regarded as a pledge, unless the form of the transfer be clearly a mortgage in terms.²

6. Whether a transaction be a pledge or a mortgage depends largely upon the intention of the parties in the inception of it. If the transaction in its origin was intended to be a mortgage, and the creditor took possession of the property as mortgagee, and held it in that capacity alone, he cannot, upon the mortgage proving void and of no effect, claim that he holds as pledgee, without some new contract between the parties. If the transaction was clearly a mortgage, and the mortgage title fails while the mortgagee is in possession, he is then left with a bare naked possession of the property, without title and without any

providing that the premiums paid by the assignee for insurance "shall be a lien upon the said *mortgaged* premises, added to the amount of said notes hereinbefore mentioned and secured by these presents."

¹ *Warren v. Emerson*, 1 Curtis, 239. *Quære*, should not this transaction have been regarded as a pledge? In *Cooper v. Whitney*, 3 Hill (N.Y.), 95, 101, a deed of land with a covenant between the parties that the grantee should sell the land and pay certain debts of the grantor, returning him the surplus, but containing no reservation of a right to redeem, was held to be a trust. The court, by Mr. Justice Bronson, said: "It may be that without such a condition the grantor could not redeem, and then there is undoubtedly some difficulty in holding that this was a technical mortgage. In *Palmer v. Gurn-*

sey, 7 Wend. 248, it was said that there was no right to redeem, and still the conveyance was held to be a mortgage. But as that doctrine is questioned by the demandant, I will assume that this was not a mortgage. What, then, was the nature of the transaction? It was not a case of purchase and sale. The grantee did not take the land to his own use. He was to sell and pay three specified debts, and return the surplus money to the grantor. This was a *trust* valid both at the common law and under our Code." See, also, *Wright v. Ross*, 36 Cal. 414, 430, per Currey, C. J.

² *Jones on Pledges*, § 9; *Haskins v. Kelly*, 1 Rob. (N. Y.) 160; *S. C.* 1 Abb. (N. Y.) Pr. (N. S.) 63; and see *Mitchell v. Roberts*, 17 Fed. Rep. 776, where the subject is discussed at length.

lien; the property belongs to the mortgagor, who may recover possession of it; or his creditors may secure and enforce their claims upon it. The whole character of the possession of the property cannot be changed at once, and without any new act or contract of the parties.¹ "The character of the possession is entirely different in the two cases. The pledgee holds property that still belongs to the pledgor; he holds possession of it under a special contract, which simply gives him the right thus to hold it, until his debt is paid. In case of a mortgage, the right of property is conveyed to the mortgagee by a perfect title, which title is liable to be defeated by the payment of the mortgage debt, and if the mortgagee takes possession of the property, he takes it as his own and not as the mortgagor's. The titles to the property are different in the two cases, and the possession is different, held under an entirely different contract. Neither a mortgage nor a pledge can exist without a special contract; and these contracts, being different in their terms, cannot be substituted, the one for the other, unless the contracting parties, in some way, make that substitution, or agree to that change."²

An instrument whereby a stockholder in a private corporation "transfers and assigns his interest" therein as security for a debt, and authorizes the transferee and his assigns "to sell and transfer said interest so as to satisfy and discharge said debt at maturity," is not a pledge of the stock, nor a mere equitable lien or charge, but is a mortgage passing the legal title as between the parties, without any transfer of the certificates of stock, or of the stock itself, on the books of the corporation.³

7. There are other distinctions between a pledge and a mortgage. One is that a delivery must always accompany the former, while the latter may be valid without a delivery, and without any record or filing of the deed, in the absence of any statute requiring such delivery and record.⁴

¹ *Janvrin v. Fogg*, 49 N. H. 340.

² *Janvrin v. Fogg*, *supra*, per Sargent, J. See, however, § 178.

³ *Campbell v. Woodstock Iron Co.* (Ala.), 3 So. Rep. 369, 370, per Somerville, J. "It shows an intention to transfer the mortgaged property as security for a debt, and imports a conveyance of title

in the nature of a conditional sale. There is absent from the transaction one necessary element of a pledge, which is possession, actual or symbolic, of the thing which is the subject of the pledge." See, also, *Cake v. Shull* (N. J.), 13 Atl. Rep. 666.

⁴ *Barrow-v. Paxton*, 5 Johns. (N. Y.)

As between a mortgage and a pledge there arise different rights in the parties, both before default and afterwards ; although the chief distinction in their rights arises after default. Upon default of a mortgage the absolute property vests in the mortgagee, and he may legally deal with the property as his own ;¹ and a tender by the debtor of the amount of the debt secured does not revest the title in him, or give him any legal right to recover the property, although he may have an equitable right of redemption. But in the case of a pledge the absolute property does not vest in the creditor upon default ; upon a tender of the debt the debtor is entitled to the property, and may recover it, or may have damages for its detention, in a suit at law. On account of these different consequences arising from regarding the transaction a pledge or a mortgage, courts have sometimes, in cases of doubt, leaned towards regarding it a pledge rather than a mortgage.² For this reason contracts, not distinguishable in terms, have sometimes been construed as mortgages and sometimes as pledges, according as the court has deemed that the intention of the parties would be best effectuated, and the purposes of justice best subserved.³

An instrument which is in form a mortgage cannot be shown by parol evidence to have been intended to constitute a mere pledge.⁴

A pledgee taking a mortgage of the same property waives his rights as pledgee.⁵

III. *A Conditional Transfer of Title Essential.*

•8. A decisive test of a legal mortgage of personal property is the use of language which makes the instrument one of sale, conveying the title of the property to the creditor conditionally, so that the sale is defeated by the debtor's performance of his agreement ; or, as it is stated by some courts, so that, by the mere non-performance of the condition by the debtor, the title is transferred absolutely to the creditor.⁶ If there be no such transfer upon a condition express or implied, the transaction is not a chat-

258 ; Parshall v. Eggart, 52 Barb. (N. Y.) 367 ; McCoy v. Lassiter, 95 N. C. 88.

¹ § 699.

² Jones on Pledges, § 13.

³ Whiting v. Eichelberger, 16 Iowa,

422 ; Wright v. Bircher, 5 Mo. App. 322 ; Fishback v. Van Dusen, 33 Minn. 111.

⁴ Whitney v. Lowell, 33 Me. 318.

⁵ Paul v. Hayford, 22 Me. 234.

⁶ Campbell v. Woodstock Iron Co. (Ala.) 3 So. Rep. 369.

tel mortgage. Thus, a paper was signed by a merchant, on applying to his bankers for a discount, in the following terms: "Received in store, for account of A. & B. (the bankers), the following named property, as security to my note given this day." It was held, aside from the objection, that there was no delivery of the property, that the instrument was not a mortgage, because it did not transfer the property to the bankers.¹ But where under similar circumstances a trader delivered to a bank, as security, a paper in the form of a warehouse receipt, which was signed by himself and acknowledged the receipt of the property from himself, and upon which he indorsed a statement that the property was free from all liens, and that he thereby transferred title to the bank, it was intimated that the instrument might operate as a mortgage.²

The delivery of a chattel by a debtor, accompanied by a written agreement that he would give up all claim to it if he should not pay his debt by a certain time, constitutes a mortgage, inasmuch as the legal title to the property passes conditionally.³ Upon the same principle a writing, stating the consideration for the delivery of a slave to be a loan of money, and that if the loan should not be repaid by a certain date the slave should be the absolute property of the creditor, the debtor binding himself to give a bill of sale when demanded, should be regarded as a mortgage.⁴

A bill of sale of slaves by a debtor to his surety, "for the full and better securing the latter from all liability" as surety, "to have and to hold the said negro fellows as his own right and title until he should become relieved from all indebtedness," was held to be a mortgage, the circumstances of the transaction conforming to this view of the transaction.⁵

9. A writing which does not convey the title to the mortgaged property is not a mortgage. Thus, a writing given by

¹ Parshall v. Eggart, 52 Barb. (N. Y.) 367.

² Farmers' & Mechanics' Nat. Bank v. Lang, 87 N. Y. 209.

³ Bunacleugh v. Poolman, 3 Daly (N. Y.), 236; and see Fowler v. Stoneum, 11 Tex. 478.

⁴ Hart v. Burton, 7 J. J. Marsh. (Ky.)

322. Whether a mortgage or pledge the court left undecided. Similar instruments were held to be conditional sales in Chapman v. Turner, 1 Call (Va.), 280; Johnson v. Clark, 5 Ark. 321.

⁵ McKnight v. Gordon, 13 Rich. (S. C.) Eq. 222.

a debtor to his creditor or surety, providing that upon default in payment of the debt the latter may take possession of the debtor's goods in the store occupied by him, and sell out of the same so much as will pay the debt with a reasonable compensation for his services, is not a mortgage, for it does not in any way purport to change the title to the property. It is nothing but a naked power, not coupled with an interest, and could never operate to give any rights in the property itself, until reduced to possession.¹ The court is bound to look to the paper itself for the intent of the instrument, and not beyond it. Even in equity an instrument must stand as written if deliberately adopted by the parties, although they mistook its legal intent.

As not answering this requirement, the following words contained in a note, given by two persons as part payment for a mare, were held not to constitute a mortgage: "Said mare to be holden to J. S. G. (one of the signers) for the amount he may pay for the same." The note was delivered to the payee, who had entire control of it; and the clause in question could only be considered as indicating the relation of principal and surety between the signers of the note. But it was not a mortgage by the principal to the surety. The instrument was not given by the one to the other.²

At law a contract to buy machinery for a manufacturer, and furnish him with raw cotton, and charge an agreed price per yard for the cloth made by it, and credit him, towards payment for the machinery, with a share of the profits from the sale of the cloth, does not amount to a mortgage of the machinery by the manufacturer to the purchaser, because the manufacturer conveys to the purchaser no title to the machinery. But if a further memorandum be attached to such a contract, to the effect that the machinery is only holden by the purchaser as collateral security for the advances made, and that it is to be given up to the manufacturer, on his refunding such advances, the transaction may be considered an equitable mortgage.³

An agreement by the owner of a stock of goods with a creditor

¹ *Neidig v. Eifler*, 18 Abb. (N. Y.) Pr. 353; *Parshall v. Eggart*, 52 Barb. (N. Y.) 367; *Bonsey v. Ameer*, 8 Pick. (Mass.) 236; *Holmes v. Hall*, 8 Mich. 66. To like effect see *Barnett v. Mason*, 7 Ark. 253, where, in a bill of sale of a steamboat, the

vendor recited that he retained a lien for unpaid purchase money. Also *McGriff v. Porter*, 5 Fla. 373; *Whilden v. Pearce* (S. C.), 2 S. E. Rep. 709.

² *Gushee v. Robinson*, 40 Me. 412.

³ *Almy v. Wilbur*, 2 Woodb. & M. 371.

that a third person shall act as a receiver, take and hold possession of the goods, keep the books, superintend the business, receive the money, and pay to the creditor at the end of each week all the moneys received until the obligation to him is cancelled, is not a mortgage, because the title does not pass by it to the creditor; but upon the delivery of possession to the receiver under such agreement the transaction is a pledge, and requires no registration for its validity against creditors.¹

An instrument whereby title is to pass to a purchaser on condition of his paying for the property, although it be actually delivered to the purchaser, is a conditional sale and not a mortgage.²

10. An agreement to give a mortgage will not avail as against creditors and subsequent purchasers. An agreement in a lease to give a chattel mortgage as security for the accruing rent, and to renew and extend it from time to time, and that such mortgage "shall be a continuing lien and security for the payment of such rent," does not by itself create a lien in favor of the lessor as against other creditors who are in a condition to contest the claim.³ A defective mortgage executed in pursuance of such agreement having been declared void as against creditors, the lessor cannot fall back upon such agreement as giving him an equity as against creditors who have obtained liens upon the property. "In what respect can his equity be distinguished from that of any prior mortgagee of a special chattel, whose mortgage or its renewal is defective? A manufacturer sells a coach from his shop for \$1,000, and takes a chattel mortgage to secure the payment of the purchase price. His equity to have his money, and to have it from the property sold, may be conceded. But he places his security in a specific form of writing, as to which the statute declares that it shall be void unless certain conditions are complied with. If he fails to comply with them, his legal and his equitable security fail together. He has embodied his equity in the form of a legal document, and he must stand upon the security thus chosen. If his vendee gives another mortgage to a creditor who complies with the statutory requirements, or if a creditor obtains

¹ *McCready v. Haslock*, 3 Tenn. Ch. 13.

³ *Platt v. Stewart*, 13 Blatchf. 481.

² *Rogers Locomotive Works v. Lewis*,

⁴ Dill. 158.

judgment against him, and levies his execution upon the coach referred to, no plea of a prior equity will avail the seller.”¹

The owner of certain chattels authorized his agent by letter to mortgage them to any one who would advance a certain sum upon them. The agent obtained the desired loan, but did not execute any mortgage to the lender, nor did the latter take possession. It was held that the facts were insufficient to constitute a mortgage.²

11. A reservation in a bill of sale or note of a lien for the purchase money does not at law constitute a mortgage; for no title passes from the debtor to the creditor.³ It is a lien by express contract, and nothing more. Consequently such an instrument need not be filed as a chattel mortgage to be valid.

An instrument whereby an owner of a vessel then building “pledged” it as security for advances, agreeing also that the creditor might buy a part of the vessel at a certain rate, is not a mortgage, for there is no transfer of title, and no delivery of possession; and besides the vessel not being in existence as such, the instrument could only create an executory contract, and not a sale either conditional or otherwise.⁴

A covenant in a lease whereby the lessees “pledge and bind all improvements and machinery which they may put on said premises, and the stock of goods which they may have on said premises, for the payment of the rent aforesaid,” is not a mortgage, and does not purport to be one. There is no transfer of title or possession. Neither is it a pledge, although the word “pledge” is used. It is simply a contract for a lien whenever the rent is in arrear, and would constitute a lien in equity.⁵

A stipulation in a lease giving the lessor a lien on the goods and furniture which might be placed upon the leased premises for his rent, and authorizing him to seize and sell the same in case of default, does not constitute a mortgage,⁶ but rather a

¹ *Platt v. Stewart*, 13 Blatchf. 481, 498, per Hunt, J.

² *Newsom v. Beard*, 45 Tex. 151.

³ *Sawyer v. Fisher*, 32 Me. 28; *Gushee v. Robinson*, 40 Me. 412; *Shaw v. Wilshire*, 65 Me. 485; *Crane v. Pearson*, 49 Me. 97; *Metcalf v. Fosdick*, 23 Ohio St. 114. And see *Goddard v. Coe*, 55 Me.

385; *Barnett v. Mason*, 7 Ark. 253; *Whilden v. Pearce* (S. C.), 2 S. E. Rep. 709, 712; *Jones on Pledges*, § 11.

⁴ *Bonsey v. Amee*, 8 Pick. (Mass.) 236.

⁵ *Groton Manuf. Co. v. Gardiner*, 11 R. I. 626. See, also, *Polk v. Foster*, 7 Bax. (Tenn.) 98.

⁶ *Dalton v. Landahn*, 27 Mich. 529.

pledge which becomes effectual upon the lessor's taking possession.¹ A reservation of such a lien to be enforced as in case of a chattel mortgage, by taking possession of the property and selling it, is at least in equity in effect a chattel mortgage.²

An instrument in writing purporting to give a lien upon a crop, in accordance with a statute enacted to secure advances made for agricultural purposes, containing at the close of it the words: "I consider the above instrument of writing a mortgage of all my personal property, such as wagons, horses, cattle," etc., was declared not to be a mortgage, because it contained no words of conveyance or transfer. It was a mere declaration in writing that the maker considered an instrument executed for a different purpose also a mortgage of other property; but his so considering it was not alone sufficient to make it a mortgage.³

An agreement whereby a land-owner is to raise crops for the benefit of a creditor to whom the same are transferred, with a reservation of enough to pay the expenses of raising and harvesting them, the creditor agreeing to apply the remainder of the proceeds of the crops to the payment of certain debts, is not a chattel mortgage, but an agreement under which the land is to be worked for the benefit of the creditor, and does not require to be filed to preserve the rights of the parties under it.⁴

12. A court of equity will recognize and sustain a contract creating a lien upon property as a mortgage, whenever it appears from the contract that the parties intended it to operate as such.⁵ In many states all distinction between law and equity has been abolished by statute, so that equitable principles are applied to proceedings which are in form actions at law.⁶ Some apparent conflict of authority may be explained in this way; but there are some decisions which cannot be so explained, for while made by courts of law, they rest upon equitable views which are not gen-

¹ *State v. Adams*, 76 Mo. 605.

² *Merrill v. Ressler* (Minn.), 33 N. W. Rep. 117. And see *McLean v. Klein*, 3 Dill. 113; *Reynolds v. Ellis*, 34 Hun (N. Y.), 47; *Thomas v. Bacon*, *Ib.* 88.

³ *Green v. Jacobs*, 5 S. C. 280.

⁴ *Haynes v. Ledyard*, 33 Mich. 319; *S. C.* 44 Mich. 621.

⁵ *McCoy v. Lassiter*, 95 N. C. 88; *Whiting v. Eichelberger*, 16 Iowa, 422.

⁶ This distinction is abolished in

California,	Nebraska,
Florida,	Nevada,
Indiana,	New York,
Iowa,	North Carolina,
Kansas,	Ohio,
Kentucky,	Oregon,
Minnesota,	South Carolina,
Missouri,	Wisconsin.

See *Jones on Mortgages*, § 1318.

erally admitted in courts of law. Thus, in Alabama an instrument inartificially drawn, containing no words of conveyance, but showing on its face that the relation of debtor and creditor existed between the parties, and declaring that the creditor "shall have a lien" on certain property of the debtor until the debt is paid, has sometimes been held to operate as a mortgage.¹ The statement that the creditor shall have a lien upon the property until the debt is paid is regarded as significant of the intention to charge the property with the payment of the debt, as would be any technical words which could be used.

An instrument conveying a lien upon crops, with a power of sale in case of default, is a good chattel mortgage.² But where, to secure advances, the borrower signed a written instrument declaring that the advances should constitute a lien on his crop, as provided by an existing statute, and further to secure the same, he bargained, sold, and conveyed certain personal property upon condition, it was held that the instrument did not operate as a mortgage upon the crop, though it did so operate upon the other property described. The intention was manifest to charge the crop by a lien, and the other property by a mortgage.³

A valid mortgage may also be made by the use of the word "mortgage" without any other word of conveyance, and without any power of sale, or authority to the mortgagee to take possession of the property on default.⁴ It may be that the word *mortgage* imports a grant and conveyance of the property; but the word *lien* could hardly be considered as having this effect.

In Georgia a mortgage conveys no title, and therefore a paper providing for a lien on a "bay mare," and showing that the mare was purchased by the mortgagor from the mortgagee, is a sufficient mortgage of the property.⁵

13. The following cases were decided upon equitable

¹ Ellington v. Charleston, 51 Ala. 166. The words of the instrument were: "We give said E. a lien on one horse, Charley, to have and to hold, until" the debt shall be paid.

² Harris v. Jones, 83 N. C. 317; Merrill v. Ressler (Minn.), 33 N. W. Rep. 117; Byrd v. Wilcox, 8 Bax. (Tenn.) 65. But statutory provisions in relation to the

creation of such a lien must be complied with. Wallace v. Palmer, 36 Minn. 126. See Jones on Liens, § 543.

³ Evington v. Smith, 66 Ala. 398.

⁴ Mervine v. White, 50 Ala. 388; and see De Leon v. Higuera, 15 Cal. 483; Jones on Pledges, § 12.

⁵ Nichols v. Hampton, 46 Ga. 253. And see Lee v. Clark, 60 Ga. 639.

grounds, though not in every instance by courts with equitable powers.

An instrument whereby the vendor of personal property retains a lien upon the property for the purchase price, possession being delivered to the vendee, is a chattel mortgage;¹ and it does not matter in such case that instead of the ordinary terms of a mortgage the words used are, "I hereby pledge and give a lien."²

A provision in a lease of a dairy farm that the lessor shall have full title, with the privilege of taking possession of all the products of the farm, in payment for the rent, amounts to a mortgage of such products; but of course it would not be effectual against the lessee's creditors unless filed or recorded as a chattel mortgage.³

A manufacturer having purchased wool, and paid for it by his note indorsed by another for his accommodation, executed at the time of such purchase a writing reciting that the note was indorsed for the purpose of enabling him to purchase the wool, and declaring that the wool and the cloth to be made therefrom should belong to such indorser until the note should be paid. The instrument was held to be a mortgage, which should be filed in order to protect the property against a subsequent purchaser in good faith from the manufacturer.⁴

A stipulation in a lease of a building to be used as a hotel, that "all the fixtures and other improvements of the hotel shall be bound for the rent and for the fulfilment of the other covenants contained in the contract on the part of the lessees," is regarded as a mortgage.⁵ Such was also held to be the effect of a stipulation in a lease of a hotel, the furniture of which the lessor

¹ *Dunning v. Stearns*, 9 Barb. (N. Y.) 630; *Byrd v. Wilcox*, 8 Bax. (Tenn.) 65; *Talmadge v. Oliver*, 14 S. C. 522. In the latter case an instrument in the following terms was held to be an equitable mortgage: "Received this day of T. one horse, for which I am to board T. and wife," for a period mentioned, "the horse to remain the property of T. until this contract is satisfied." So where a note was given for goods purchased, the payee "retaining title, ownership, and possession" until the note was fully paid. *Straub v. Screvan*, 19 S. C. 445. See, also, *Dowdell v. Empire Furniture & L. Co. (Ala.)* 4 So. Rep. 31.

² *Langdon v. Buel*, 9 Wend. (N. Y.) 80. And see *Jones on Liens*, § 1110; *Frick v. Hilliard*, 95 N. C. 117.

³ *Johnson v. Crofoot*, 53 Barb. (N. Y.) 574; *S. C.* 37 How. Pr. 59. And see *Mitchell v. Badgett*, 33 Ark. 387; *Valentine v. Washington*, *Ib.* 795.

⁴ *Thompson v. Blanchard*, 4 N. Y. 303.

⁵ *Wright v. Bircher*, 5 Mo. App. 322; affirmed, 72 Mo. 179. On the same facts in a later case it was held that the relation of the lessor to the property was that of pledgee rather than mortgagee. *State v. Adams*, 76 Mo. 605. And see *Kuschell v. Campau*, 49 Mich. 34.

at the same time sold to the lessee, that the "lessor is to have a lien on the same for the faithful performance of this obligation on the part of the lessee."¹

A clause in a lease declaring that the lessor shall have a lien on the crops that may be raised during the year is valid as a chattel mortgage if duly filed or recorded as such, and is not a mere executory agreement for an equitable lien.²

A stipulation in a lease that the amount due for rent shall be paid before the crops are removed from the leased premises is regarded as a mortgage.³

A court of equity cannot, however, make a contract for parties different from that which they have agreed upon. Thus where they have deliberately agreed not to secure a debt by mortgage, but to substitute a power of attorney authorizing the creditor to sell certain personal property belonging to the debtor, and apply its proceeds to the payment of the debt, and the power is annulled by the death of the debtor, a court of equity will not direct a new security to be given, nor fix a lien on the property as security for the debt, although satisfied that the parties acted in ignorance of that rule of law which makes the death of the constituent a revocation of the power.⁴

14. But a bill of sale of chattels, declared to be made to secure a debt, possession of them remaining with the vendor, is a mortgage at law.⁵ And so an absolute bill of sale of goods, and a stipulation by the vendee that the vendor shall remain in possession of the goods until the expiration of a certain time allowed for the payment of a previous debt, is a mortgage.⁶ Such

¹ *Whiting v. Eichelberger*, 16 Iowa, 422.

² *Nestell v. Hewitt*, 19 Abb. N. C. (N. Y.) 282.

³ *Weed v. Standley*, 12 Fla. 166.

⁴ *Hunt v. Rhodes*, 1 Peters, 1. And see *Hunt v. Rousmanier*, 8 Wheat. 174.

⁵ *Bissell v. Hopkins*, 3 Cow. (N. Y.) 166; *McFadden v. Turner*, 3 Jones (N. C.) L. 481; *Ross v. Ross*, 21 Ala. 322; *Musgat v. Pumpelly*, 46 Wis. 660; *Moore v. Murdock*, 26 Cal. 514; *Cooper v. Brock*, 41 Mich. 488; *S. C. 2 N. W. Rep.* 660. In the latter case a bill of sale in the usual form contained this clause: "This bill of

sale is given for the security of moneys advanced." It was held to be a mortgage. The court, by Marston, J., said: "The mere fact that an instrument does not contain terms of defeasance cannot be at all decisive in determining the question whether it shall be considered a mortgage or not. If from the entire instrument, either standing alone or read in the light of the surrounding circumstances, it appears to have been given as a security, it must be considered as a mortgage, and the law will apply thereto the rules applicable to mortgages."

⁶ *Ford v. Ransom*, 39 How. (N. Y.) Pr.

instruments in terms fulfil in themselves the essential conditions of a mortgage; for they make a transfer by way of security, and name a contingency on which the transfer is to become void, namely, the payment of the debt.

A writing in the following words: "Turned out and delivered to A. one white and red cow, which he may dispose of in fourteen days to satisfy an execution," the possession of the cow being left with the debtor, was held to be a mortgage.¹ And such also was the construction of a writing whereby a lessee "turns out his black cow as security for said rent," the cow remaining in the possession of the lessee, and the creditor having the power to take the cow in case the rent should not be paid as agreed.²

A strong reason in these last cases for declaring the transaction to be a mortgage seems to have been that effect could be given to the instrument in no other way, there being no delivery of the property, a condition indispensable to a pledge.

A bill of sale whereby a debtor conveys property to his creditor as security, and which provides that the property shall remain in the debtor's possession, and he shall have thirty days to redeem by paying the debt, is a mortgage.³ And so is a bill of sale of goods which declares the object of it to be to secure the vendee as surety for the vendor, and provides that in case the vendee shall become liable, he may turn the goods out on execution for the debt, or may take them into his own possession and dispose of them at private sale, accounting to the vendor for the proceeds.⁴

15. A writing reciting a sale and transfer of property to secure a debt, and a delivery of it with authority to sell upon default, is for this reason a mortgage.⁵ Such is the effect of a writing acknowledging the receipt of a sum of money, for the payment of which, by a certain day, assignment is made of "the free and full title to a negro girl."⁶ A contract reciting a sale of a mare for a certain sum, and that the condition of the sale

429; *Gifford v. Ford*, 5 Vt. 532; *Blodgett v. Blodgett*, 48 Vt. 32. And see *Joyner v. Vincent*, 4 D. & B. (N. C.) L. 512; *Bartels v. Harris*, 4 Me. 146.

¹ *Atwater v. Mower*, 10 Vt. 75.

² *Coty v. Barnes*, 20 Vt. 78.

³ *Blodgett v. Blodgett*, *supra*.

⁴ *Marsh v. Lawrence*, 4 Cow. (N. Y. 461.

⁵ *Barfield v. Cole*, 4 Sneed (Tenn.) 465; *Findley v. Deal*, 69 Ga. 359; *Frost v. Allen*, 57 Ga. 326.

⁶ *Ross v. Ross*, 21 Ala. 322.

is that the seller may redeem the property within a specified time upon paying the sum first mentioned, with the expense of keeping the mare, is a mortgage in terms and effect, though not formal in language. The general property is passed subject to redemption. It is a sale with a condition. Its terms are wholly inconsistent with a contract of pledge.¹ A proviso in a deed of sale that the vendor shall have "the privilege of redeeming the property conveyed," imports a mortgage security, and not a sale.²

A writing upon a bill of sale of a cow in the form of a promissory note by the vendor, with a stipulation that the cow shall remain the property of the vendee until the note is fully paid, makes the transaction a mortgage.³

A bill of sale of property by a debtor to his surety, made for the "better securing him from all liability" as surety, "to have and to hold the same as his own right and title until he shall become relieved from all indebtedness" as such surety, the property remaining in the possession of the debtor, is a mortgage.⁴

An instrument, after reciting that the maker was indebted in a certain amount, for which he had given his note, conveyed to the creditor certain personal property, specifying that it was intended that the title should pass. It provided further that if the note should not be paid when due, the creditor should take possession of the property, and after advertising should sell it and apply the proceeds to the debt; but that if the note were paid at maturity, he should reconvey the property by quitclaim deed. The instrument was held to be a mortgage. It was intended to be a security, and vested the title to the property in the creditor for the purpose of authorizing him to sell in the event of the debtor's default.⁵

16. Some courts, however, require a more definite statement of the terms of the condition. Thus in Massachusetts a deed of chattels absolute in form, but reciting an indebtedness by note from the grantor to the grantee, is not regarded as necessarily a mortgage. The implication that the instrument is a mortgage because it does not in terms declare a satisfaction of

¹ Wood v. Dudley, 8 Vt. 430.

⁴ McKnight v. Gordon, 13 Rich. (S. C.)

² Wilson v. Weston, 4 Jones (N. C.) Eq. 222.
Eq. 349.

⁵ Frost v. Allen, 57 Ga. 326.

³ Woodman v. Chesley, 39 Me. 45.

the debt is too remote.¹ Since the law has definitely recognized mortgages of personal property given under certain restrictions, provided for a right of redemption, and made the property still liable by attachment for the debts of the general owner, it is regarded as important that the condition should not only be expressed, but that the terms should be stated so definitely as to enable creditors to ascertain with a good degree of certainty the true character of the contract.² A defeasance cannot be engrafted upon a conveyance of personal property by parol.³ If a person borrow money on his promissory note, and deliver to the lender a quantity of merchandise with a receipted bill of parcels, the transaction is not a mortgage, but may be deemed a pledge, putting it on the same footing as if no bill of sale had been executed.⁴

17. A technical mortgage must contain a condition or defeasance making the instrument void upon performance of the condition, whether this be the payment of a sum of money, or the fulfilment of some other duty or obligation. In a formal mortgage the condition is formally expressed. But a formal expression of it is not essential. The condition may be implied from a recital that the sale was made to secure a debt. But if there are words which negative any implication that the sale is to be void upon payment, or if there be a provision that the creditor shall then assign the property, the transaction may not be a mortgage. Thus by an instrument signed by a debtor and creditor the former conveyed to the latter certain timber as security for his debt, and stipulated that if he should pay the debt according to its terms, the latter would transfer the timber, and whatever proceeds thereof he might receive, discharged of all claims; that if the indebtedness should not be paid as stipulated, the creditor might "sell and dispose of so much of said timber as shall pay and reimburse him;" that when paid by a sale of a portion of the timber, the creditor should "transfer to the debtor all the timber undisposed of free from all claims." The instru-

¹ *Miller v. Baker*, 20 Pick. (Mass.) 285.

⁴ *Whitaker v. Sumner*, 20 Pick. (Mass.)

² Per Shaw, C. J., in *Miller v. Baker*, 20 Pick. (Mass.) 285.

399. See, also, *Putnam v. Rowe*, 110 Mass. 28; *Jones on Pledges*, § 14.

³ *Pennock v. McCormick*, 120 Mass. 275.

ment was held not to be a mortgage, because it was not to become void upon payment of the sum due.¹

And so where a debtor made a bill of sale of certain lumber to his creditor, who gave a writing providing that he would sell and dispose of the lumber, and apply the proceeds first to paying the debt due him, together with the charges and expenses of sale, and then would pay over to the debtor the remainder of the proceeds, the transaction was declared not to be a mortgage, because no property or right of redemption was reserved by the debtor; but whatever interest he had was not in the lumber, but in any surplus of proceeds remaining after payment of the debt.²

18. Whether an instrument be in itself a mortgage is a question of law, to be determined by the court; and therefore in an action founded upon it, either the whole instrument, or those provisions which are relied upon as giving it the character of a mortgage, must be set forth in the declaration or complaint.³

If an instrument upon its face leaves it in doubt whether the parties intended it as a mortgage or a conditional sale, the jury may determine its character from the accompanying circumstances.⁴

IV. *Bill of Sale with Separate Defeasance.*

19. A conveyance of goods absolute in form, and an agreement simultaneously executed by the assignee to reconvey them upon payment of a loan made by him at the time to the assignor, constitute a mortgage, as between the parties.⁵ The two instruments are construed together as part of the same transaction. But to have this effect they must be executed at the same time, or, if the defeasance be subsequently executed, it must be in pursuance of an agreement to execute it as part of the original

¹ Goddard v. Coe, 55 Me. 385.

² Camp v. Thompson, 25 Minn. 175, 181; followed in Butler v. White, 25 Minn. 432. See, however, Gage v. Chesebro, 49 Wis. 486; S. C. 5 N. W. Rep. 881.

³ Fairbanks v. Bloomfield, 2 Duer (N. Y.), 349.

⁴ Gaither v. Teague, 7 Ired. (N. C.) L. 460; Jones on Pledges, § 19.

⁵ Carpenter v. Snelling, 97 Mass. 452; Taber v. Hamlin, 97 Mass. 489; Potter v. Boston Locomotive Works, 12 Gray (Mass.), 154; Lobban v. Garnett, 9 Dana (Ky.), 389; Winslow v. Tarbox, 18 Me. 132; Bartels v. Harris, 4 Me. 146; Davis v. Hubbard, 38 Ala. 185; Polhemus v. Trainer, 30 Cal. 685.

See, also, Jones on Mortgages, §§ 241, 255.

transaction. A subsequent defeasance, not executed in fulfilment of such an agreement, is void in law unless it be made upon a new consideration.¹

A bill of sale of chattels with a separate defeasance is as clearly a mortgage as if the defeasance formed a part of the bill of sale.² An agreement made by the vendee to reconvey upon certain terms, although not in the form of a defeasance, will be considered as in effect a defeasance, when shown to have been made at the time of the making of the bill of sale, and as part of the same transaction, and to have been intended only as a security for a previous indebtedness, or for a loan made at the time.³ A bill of sale of an engine, boiler, and fixtures, and a lease made at the same time by the vendee to the vendor, containing a clause whereby the latter agrees to buy back the property at a fixed price, constitute a mortgage.⁴

20. A defeasance subsequently executed will make the sale a mortgage in equity. Thus, a writing was executed subsequently to an absolute bill of sale, reciting that it was agreed between the parties, at the time the deed of sale was executed, that if the vendor should repay to the vendee by a specified day the amount of the consideration expressed in the deed, then the latter would reconvey the property. Although the recital was not regarded as sufficient by itself to show that the parties intended the bill of sale to operate as a mortgage, yet it was regarded as evidence of the highest character against the party who executed it; and it was declared that if the other evidence in the cause showed that the intention of the parties was that the deed should operate as a mortgage, or even rendered it doubtful whether a conditional sale or mortgage was intended, a court of equity would hold the transaction to be a mortgage.⁵

V. *An Absolute Bill of Sale at Law and in Equity.*

21. At law, as a general rule, the terms of a deed cannot be varied by parol; and therefore a formal bill of sale absolute in its terms and under seal, conveying personal property with covenants of warranty, cannot, in an action at law between the

¹ *Freeman v. Baldwin*, 13 Ala. 246.

² *Brown v. Bement*, 8 Johns. (N. Y.) 96.

³ *Barnes v. Holcomb*, 12 Sm. & M.

⁴ *In re Gurney*, 7 Biss. 414.

⁵ *Locke v. Palmer*, 26 Ala. 312.

parties, be shown by parol evidence to have been intended as a mortgage; for this would be altering or varying by parol evidence the legal effect of the instrument.¹ But such evidence is admissible for the purpose of showing that the bill of sale was a pretence and a fraud, intended merely to deceive creditors, or those who might deal with the parties, as to the goods, and not to express a real transaction.² Such evidence is also admissible when introduced not to invalidate the title conveyed by the absolute bill of sale, but to show the consideration of it, and the mode in which the proceeds of a resale of the property should be applied. Thus, an absolute bill of sale of certain property was given by the maker of a promissory note to the payee at the time of executing the note; and in an action upon the note, it was held to be competent for the defendant to show that it was agreed subsequently that this property should be held for the payment of the note, and that, in pursuance of it, the payee sold the property and assumed to apply the proceeds upon it, but in fact so applied only a part of the proceeds.³ Such evidence does not tend to alter or vary the absolute bill of sale so far as it transferred the property, but to show the real character of the entire transaction as bearing upon the question how far the note could be enforced.

The fact that a bill of sale of a vessel was intended only as collateral security may be shown by parol for the purpose of negating any authority of the master to procure supplies or repairs on the credit of its holder. The purpose of such evidence is not to vary or alter the legal effect of the bill of sale as between the parties to it, or those claiming derivatively under it, but to show the real nature of the transaction, as bearing upon another and incidental question.⁴

The rule against the admission of parol evidence at law does not apply to the case of a mere bill of parcels, but such evidence is admissible to show that a mortgage was intended and not a

¹ *Harper v. Ross*, 10 Allen (Mass.), 332; *Hartshorn v. Williams*, 31 Ala. 149; *Bryant v. Crosby*, 36 Me. 562; *Hogel v. Lindell*, 10 Mo. 483; *Montany v. Rock*, 10 Mo. 506; and see *Jones on Mortgages*, § 282. *Contra* admissible at law as well as equity. *Fuller v. Parrish*, 3 Mich. 211; *McAnnulty v. Seick*, 59 Iowa, 586; *Cunningham v. Hawkins*, 27 Cal. 603; *Jackson v. Lodge*, 36 Cal. 28. Parol evidence,

to show that an absolute bill of sale was intended as a mortgage, was admitted at law in a case where both parties concurred in offering such proof. *Reed v. Jewett*, 5 Me. 96.

² *Pennock v. McCormick*, 120 Mass. 275, per Devens, J.; *Hartshorn v. Williams*, 31 Ala. 149.

³ *Creech v. Byron*, 115 Mass. 324.

⁴ *Howard v. Odell*, 1 Allen (Mass.), 85.

sale.¹ Such a bill of parcels is an informal document, intended only to specify the price, the articles purchased, the names of the buyer and seller, and a receipt of payment. It is not used or designed to embody and set out the terms and conditions of a contract of bargain and sale. It is in the nature of a receipt, and is always open to evidence to show the real terms upon which the agreement of sale was made between the parties.²

22. In equity a bill of sale of chattels absolute in terms becomes a mortgage, upon proof by parol that it was made to secure a debt, such evidence being always admissible for this purpose.³ It is the fact that there is a defeasance and not the evidence of the fact that makes an absolute bill of sale a mortgage.⁴ This fact must be established by clear and decisive testimony.⁵

A bill of sale absolute on its face, but accompanied by a verbal defeasance, is a mortgage not only as between the parties to it, but also as to third persons who have actual notice, or such knowledge of the facts as will charge them with notice; and a sale of the chattels by the mortgagor to a third person, in payment of a debt due from him to them, conveys no title.⁶ If, however, third persons have in good faith placed trust and confidence in the ap-

¹ *Caswell v. Keith*, 12 Gray (Mass.), 351.

² *Hazard v. Loring*, 10 Cush. (Mass.) 267.

³ *Massachusetts*: *Parks v. Hall*, 2 Pick. 206, per Wilde, J. *New York*: *Despard v. Walbridge*, 15 N. Y. 374; *Hodges v. Tenn. Marine & Fire Ins. Co.* 8 N. Y. 416; *Smith v. Beattie*, 31 N. Y. 542; *Coe v. Cassidy*, 72 N. Y. 133; *Michelson v. Fowler*, 27 Hun, 159; *Keller v. Paine* (N. Y.), 13 N. E. Rep. 635. *Maryland*: *Farrell v. Bean*, 10 Md. 217; *Ing v. Brown*, 3 Md. Ch. 521; *Dougherty v. McColgan*, 6 G. & J. 275; *Laeber v. Langhor*, 45 Md. 477. *Georgia*: *Stokes v. Hollis*, 43 Ga. 262. *Alabama*: *Parish v. Gates*, 29 Ala. 254; *Todd v. Hardie*, 5 Ala. 698; *Hudson v. Isbell*, 5 St. & P. 67. *Louisiana*: *Watson v. James*, 15 La. Ann. 386. *Illinois*: *National Ins. Co. v. Webster*, 83 Ill. 470. *Arkansas*: *Scott v. Henry*, 13 Ark. 112; *Johnson v. Clark*, 5 Ark. 321; *Rogers v.*

Vaughan, 31 Ark. 62. *Kansas*: *Butts v. Privett*, 36 Kans. 711; 14 Pac. Rep. 247; *Seavey v. Walker*, 9 N. E. Rep. 347. *Mississippi*: *Carter v. Burris*, 10 Sm. & M. 527; *Humphries v. Barte*, 282. *Kentucky*: *Ward v. Deering*, 2 Mon. 9. *Tennessee*: *Lloyd v. Currin*, 3 Humph. 462; *Hickman v. Cantrell*, 9 Yerg. 172; *Wilson v. Carver*, 4 Hayw. 90. *Oregon*: *Hurford v. Harned*, 6 Oreg. 362; *Bartel v. Lope*, 1b. 321; *Nicklin v. Betts Spring Co.* 11 Oreg. 406. *Indiana*: *Love v. Blair*, 72 Ind. 281. *Wisconsin*: *First Nat. Bank v. Damm*, 63 Wis. 249; *Lamson v. Moffat*, 61 Wis. 153; *Manufacturers' Bank v. Rugee*, 59 Wis. 221; *Rockwell v. Humphrey*, 57 Wis. 410; and see *Jones on Mortgages*, §§ 282-323.

⁴ *Rogers v. Vaughan*, *supra*, per Williams, J.; *Wilmerding v. Mitchell*, 42 N. J. L. 476.

⁵ *Triebler v. Andrews*, 31 Ark. 163.

⁶ *Omaha Book Co. v. Sutherland*, 10 Neb. 334; *S. C.* 6 N. W. Rep. 367.

parent absolute title of such a purchaser, and have been misled by the form of the transfer to believe that it is indefeasible, they have the right to insist that as to them the instrument shall be what upon its face it purports to be.¹

It may also be shown that it was the contract that the possession of the personal property described in the written instrument should remain with the mortgagor.²

A lease whereby the lessor surrenders possession of a farm, and agrees to do all the work in raising a crop thereon, and to deliver the whole of such crop to the lessee, the latter agreeing to make advances, may be shown to be a mortgage.³

23. The ground upon which parol evidence is admitted to prove an absolute deed of sale to be a mortgage is in several states declared to be fraud, accident, or mistake;⁴ and the earliest cases both in England and America admitted such evidence solely upon these grounds.

In some cases it has been declared that it would be fraud upon the part of the vendee to claim to hold the property discharged of the parol conditions or trusts which were attached to it with his consent; that it would be fraud to insist that the sale is absolute, when in fact it was intended to be redeemable.⁵

But the better doctrine, and that more generally accepted in this country, is, that the admission of parol evidence is not confined to cases of distinct fraud, accident, or mistake; but that such evidence is admissible upon the broad ground that the deed of sale, though absolute in form, was intended merely as a security in the nature of a mortgage; and that upon this ground alone courts of equity may take jurisdiction and afford relief.⁶ The

¹ *Morgan v. Shinn*, 15 Wall. 105, per Strong, J.

² *Butts v. Privett*, 36 Kans. 711.

³ *Lamson v. Moffat*, 61 Wis. 153.

⁴ *Alabama*: *Freeman v. Baldwin*, 13 Ala. 246; *McKinstry v. Conly*, 12 Ala. 678; *Sewell v. Price*, 32 Ala. 97.

North Carolina: *Whitfield v. Cates*, 6 Jones Eq. 136.

In *Georgia* it is provided by statute that a bill of sale absolute on its face, and accompanied with possession of the property, shall not be proved at the instance

of the parties, by parol evidence, to be a mortgage only, unless fraud in its procurement is the issue to be tried. Code 1873, § 3809.

⁵ *Sewell v. Price*, *supra*.

⁶ *Arkansas*: *Johnson v. Clark*, 5 Ark. 321. *Michigan*: Both at law and equity. *Fuller v. Parrish*, 3 Mich. 211. *New York*: *Tyler v. Strang*, 21 Barb. (N. Y.) 198. *Virginia*: *Ross v. Norvell*, 1 Wash. 14.

The grounds for the admission of parol evidence, to show that a bill of sale of personal property is really a mortgage,

fault with the instrument in such case is inherent in the transaction itself, and does not arise out of the subsequent conduct of the vendee in attempting to retain the property as irredeemable. Upon the same grounds it may be shown that an absolute assignment of a contract for the sale of real estate, or of a policy of insurance, was intended to operate as a mortgage.¹

24. All the attendant circumstances may be considered for the purpose of ascertaining the true intention of the parties to an absolute bill of sale; such as the situation of the parties, their acts and declarations, the existence of a previous debt from the vendor to the vendee, the seeking of a loan by the vendor from the vendee, the value of the property and the price paid for it, the continued possession of the vendor, or his delay in asserting the transaction to be a mortgage; in short, any and all circumstances attending the transaction in its inception, its continuance, or its close, tending to show the object of it, may be shown upon the one side or the other.²

The question to be determined by the jury is whether the transaction was in substance a mortgage, notwithstanding the form the parties have given to it; and this question is to be determined upon the evidence, independently of the form of the instrument and of the form of the transaction.³ The form may be an intentional disguise of the real nature of the dealing between the parties, and it is the latter that the jury is to find out.⁴ Evidence of the declarations of the parties at the time of the transaction, that it should be a mortgage or should be a sale, is of little or no account.⁵

25. Where one purchases property at an execution or mort-

are the same as those upon which a deed of real estate may be shown to be a mortgage of it.

See Jones on Mortgages, §§ 285-323.

¹ Tyler v. Strang, 21 Barb. (N. Y.) 198.

² Scott v. Henry, 13 Ark. 112, per Walker, J.; Perkins v. Drye, 3 Dana (Ky.), 170; Smith v. Pearson, 24 Ala. 355; Desloge v. Ranger, 7 Mo. 327; Carter v. Burris, 10 Sm. & M. (Miss.) 527; Cooper v.

Brock, 41 Mich. 488; Coe v. Cassidy, 72 N. Y. 133.

See Jones on Mortgages, § 324.

³ Manufacturers' Bank v. Rugee, 59 Wis. 221; Butts v. Privett, 36 Kans. 711, 14 Pac. Rep. 247; Cockrane v. Price (Md.), 8 Atl. Rep. 361.

⁴ Horne v. Puckett, 22 Tex. 201; Hopkins v. Thompson, 2 Port. (Ala.) 433.

⁵ Colvard v. Waugh, 3 Jones (N. C.) Eq. 335; Blackwell v. Overby, 6 Ired. (N. C.) Eq. 38.

gage sale for the benefit of the debtor, and afterwards gives the debtor a written agreement to reconvey the property whenever the debtor shall pay him the amount paid for the property, the contract is not a mortgage, because there was no debt due such purchaser by the execution debtor. If the property should prove not to be worth the sum paid for it, or should be wholly lost, the purchaser could assert no claim against the former owner. The contract is simply one for a repurchase of the property.¹

VI. *A Mortgage Distinguished from a Conditional Sale.*

26. If an absolute sale be made without continuing or creating a debt on the part of the vendor, but he merely obtains the privilege of repurchasing within a specified time, the transaction is a conditional sale.²

Where upon the making of a bill of sale of certain property the vendor received two hundred dollars, saying that he would return it if he could, and otherwise that he would sell the property to the vendee for one thousand dollars, and other payments were made sufficient to make up that sum, it was held to be a question for the jury to determine whether the transaction was a mortgage or an absolute sale.³

A bill of sale which reserves to the vendor "the right to redeem the property" by a specified day, and contains a stipulation on his part that, in the event of his failure to redeem, he would pay a certain sum for the use of the property in the mean time, is a conditional sale, and not a mortgage. It will certainly be so regarded when it is shown that the consideration for the sale was the payment by the vendee, at request of the vendor, of a debt the latter owed to a third person, who held a mortgage upon the same property, and that there was no great disparity between the value of the property and the sum so paid.⁴

A contract for the purchase of a canal boat, stipulating that the purchaser shall pay a certain price in instalments, shall have the possession and use of the boat unless default be made in the payments agreed upon; that on full payment a bill of sale shall be

¹ Magee v. Catching, 33 Miss. 672.

See Jones on Mortgages, §§ 331, 332.

² Sewall v. Henry, 9 Ala. 24; Eiland

v. Radford, 7 Ala. 724; Weathersly v.

Weathersly, 40 Miss. 462; Gomez v.

Kamping, 4 Daly (N. Y.), 77.

³ Goodwin v. Kelly, 42 Barb. (N. Y.) 194.

⁴ Logwood v. Hussey, 60 Ala. 417. See, also, Morrow v. Turney, 35 Ala. 131.

executed to him, but in case of default the vendor shall have the right to take and sell the boat at public auction, on giving such notice as is required on sales of personal property on execution, and shall apply the proceeds to the payment of the debt remaining unpaid, and pay the surplus to the purchaser; and providing that the purchaser shall have no right in or title to the boat until it shall be fully paid for, — was construed to be a conditional sale rather than a mortgage.¹ Whatever doubt or obscurity there was in the instrument arose from the provision regarding the vendor's right to sell in case of the vendee's default. Except for this provision it would be clear that the parties intended simply to agree for a sale of the boat, the title to vest upon payment being fully made. But the provision for the sale of the boat upon default, and the application of the proceeds, was thought not to be inconsistent with a conditional sale. It should require a striking and substantial inconsistency, say the court, to overcome the express language of the concluding clause of the writing, — that nothing in the writing should be so construed as to give the purchaser any right in or title to the boat until full payment.

In like manner an agreement for the sale of certain machines at a stipulated price, payable within a limited time, providing also that the owner shall lend the machines to the purchaser, and that if the latter fails to pay, the former shall be "at liberty to take the property away, to enable him to realize the amount and interest," was held to be a conditional sale, rather than an absolute sale with a reconveyance by way of mortgage. There was nothing in the transaction to pass the title to the property.² There can be no mortgage without a conveyance of the property from a debtor to his creditor.³

27. Whether there is a debt between the parties is an important inquiry in determining the nature of the transaction. If there was a previous debt, and this was not extinguished by the sale, but remained as a subsisting obligation, the bill of sale, when connected with the debt by proper evidence, will be regarded as a mortgage.⁴ But if the previous debt was extinguished

¹ *Brewster v. Baker*, 20 Barb. (N. Y.) 364. And see *Cadle v. McLean*, 48 Wis. 581.

630; *S. C.* 4 N. W. Rep. 275; *Keitt v. Counts*, 15 S. C. 493.

² *Grant v. Skinner*, 21 Barb. (N. Y.)

³ *Pierce v. Scott*, 37 Ark. 308.

⁴ *Rockwell v. Humphrey*, 57 Wis. 410.

by the sale, and the vendor has the privilege of repurchasing within a given time, the transaction is a conditional sale.¹ When the evidence of a previous debt is given up at the time of a sale apparently absolute, nothing short of the clearest and most convincing proof that a remedy still existed for the recovery of the debt will suffice to convert the sale into a mortgage.² But although the giving up of the evidence of a former debt is a very strong circumstance to show that the relation of debtor and creditor was destroyed, and that the property was taken in payment, yet it is not altogether conclusive.³

If a preëxisting debt was extinguished by a bill of sale, a verbal agreement by the creditor to resell, on the debtor's fulfilling certain conditions, makes the transaction a conditional sale and not a mortgage.⁴

If the previous debt was not discharged by the sale, its continuance raises a strong presumption that the transaction was a mortgage.⁵ If the debt was in fact extinguished by the sale, the mere retention of the paid note for the purposes of the conditional repurchase does not continue it as a legal obligation of any force or effect, and does not make the transaction a mortgage.⁶ Thus, where a debtor gave his creditor a bill of sale of certain goods for the amount due the latter upon a note, and while retaining possession of the goods gave the creditor a storage receipt, acknowledging that he held the goods for the latter, and it was verbally agreed that the vendor might have the goods again by paying the debt within a specified time, although the vendee in the mean time held the note, the transaction was held to be a conditional sale and not a mortgage.⁷

In a deed of chattels a recital of an existing debt of the grantor

¹ **North Carolina:** *Poindexter v. McCannon*, 1 Dev. Eq. 377. **Kentucky:** *M'Ginnis v. Hart*, 4 Bibb, 327; *Harrison v. Lee*, 1 Litt. 191; *Bishop v. Rutledge*, 7 J. J. Marsh, 217; *Hart v. Burton*, Ib. 322. **Alabama:** *Sewall v. Henry*, 9 Ala. 24, 31, per Collier, C. J.; *Eiland v. Radford*, 7 Ala. 724; *Haynie v. Robertson*, 58 Ala. 37; *Peeples v. Stolla*, 57 Ala. 53. **Tennessee:** *Hickman v. Cantrell*, 9 Yerg. 172. **Mississippi:** *Magee v. Catching*, 33 Miss. 672.

See Jones on Mortgages, § 326.

² *McKinstry v. Conly*, 12 Ala. 678.

³ *Locke v. Palmer*, 26 Ala. 312.

⁴ *Coe v. Cassidy*, 6 Daly (N. Y.), 242; *Pierce v. Scott*, 37 Ark. 308.

⁵ *Dabney v. Green*, 4 H. & M. (Va.) 101; *Mosely v. Crocket*, 9 Rich. (S. C.) Eq. 339; *Folsom v. Fowler*, 15 Ark. 280; *Rapier v. Gulf City Paper Co.* 77 Ala. 126; *S. C.* 69 Ala. 476.

⁶ *Gomez v. Kamping*, 4 Daly (N. Y.), 77.

⁷ *Gomez v. Kamping*, *supra*, Daly, J., dissenting.

to the grantee for a certain amount as the consideration is not a sufficient implication that the deed is a mortgage to secure such a debt, in the absence of any declaration in it that the conveyance is made for that purpose.¹

28. If there was no previous debt, but one was created at the time of the sale, and this was made merely as security for the loan, there is a strong indication that the transaction was a mortgage. It is an important element in the transaction that the negotiation commenced by a proposition to borrow or lend money.² "The intention which we are to investigate is whether the parties designed a sale and purchase on the one hand, or a borrowing and lending on the other; whether they were treating of an absolute or conditional sale, or of the loan or procurement of money on security, by the conveyance of property. If the transaction shows that it was designed to borrow money upon a security therefor, nothing can divest it of the equity of redemption, for it is a mortgage; and, if a mortgage, not even the agreement of the parties that it shall be irredeemable would control or change the rule in equity."³

Although the fact that the negotiation between the parties commenced with a proposition for a loan is to be considered, still it is to be recognized that the parties may have concluded upon a sale instead of a mortgage.⁴ A person being in want of money applied to another for a loan, which the latter refused, but agreed that if the former would convey to him a certain slave he would advance the money; and if it should be returned to him, with interest, at Christmas, he would release the slave, but if not returned, he would make up and pay the price fixed upon as the value of the slave, whom he would keep. The parties requested a scrivener to draw up a conditional bill of sale of the slave, which was drawn accordingly, and executed by the owner. The latter failing to make payment at the time specified, the vendee obtained possession of the slave, insisting that the transaction was a conditional sale, which he could make absolute by paying the addi-

¹ *Miller v. Baker*, 20 Pick. (Mass.) 285.

² *Sewall v. Henry*, 9 Ala. 24, 34, per Collier, C. J.; *Smith v. Quartz Mining Co.* 14 Cal. 242; *Perkins v. Drye*, 3 Dana (Ky.), 170; *Locke v. Palmer*, 26 Ala. 312; *Ross v. Ross*, 21 Ala. 322; *Weathersly v.*

Weathersly, 40 Miss. 462; *Rockwell v. Humphrey*, 57 Wis. 410.

³ *Weathersly v. Weathersly*, *supra*, per Harris, J.

⁴ *Quirk v. Rodman*, 5 Duer (N. Y.) 285.

tional sum agreed upon to make up the price of the slave; and such the transaction was held to be. The real contract was a sale of the slave, conditional until a certain time, and afterwards absolute.¹

An express promise to pay on the part of the alleged mortgagor is not absolutely essential to sustain the claim; and the absence of such a promise, while it strongly tends to disprove the claim, is not conclusive against it.²

29. Inadequacy of price is a circumstance which indicates that the transaction is a mortgage rather than a conditional sale.³ On the other hand, when a bill of sale is made for the full price of the property, and no evidence of indebtedness is given, and there is no covenant to repay, this fact indicates an absolute sale, or, if there be an agreement to reconvey, a conditional sale.⁴

30. The courts incline to construe an absolute sale and simultaneous agreement for a resale to be a mortgage, rather than a conditional sale, if there is anything to show that the transaction was intended as security for a debt, or the evidence leaves the intention of the parties in doubt.⁵ If the intention of the parties cannot be determined from the instrument itself, parol evidence is admissible to show what the character of the instrument is. Such evidence is not admissible when the instrument upon its face is clearly a mortgage or a conditional sale.⁶

31. A provision in regard to the loss or death of a slave or animal, which is the subject of an absolute sale, with an agreement for repurchase, is important in determining the character of

¹ *Moss v. Green*, 10 Leigh (Va.), 251.

² *Morris v. Budlong*, 78 N. Y. 543.

³ *Jones on Mort.* § 329. *Alabama*: *Rapier v. Gulf City Paper Co.* 77 Ala. 126; *Parish v. Gates*, 29 Ala. 254; *Todd v. Hardie*, 5 Ala. 698; *Eiland v. Radford*, 7 Ala. 724; *Hudson v. Isbell*, 5 St. & P. 67. *Other States*: *Knox v. Black*, 1 A. K. Marsh. (Ky.) 298; *Wilson v. Weston*, 4 Jones (N. C.) Eq. 349; *Fountain v. Bryce*, 12 Rich. (S. C.) Eq. 234; *Wilson v. Carver*, 4 Hayw. (Tenn.) 90; *Quirk v. Rodman*, 5 Duer (N. Y.), 285; *Cooper v. Brock*,

41 Mich. 488; *Leblanc v. Bouchereau*, 16 La. Ann. 11.

⁴ *Scott v. Britton*, 2 Yerg. (Tenn.) 215.

⁵ *Poindexter c. McCannon*, 1 Dev. (N. C.) Eq. 377; *Barnes v. Holcomb*, 12 S. & M. (Miss.) 306; *Locke v. Palmer*, 26 Ala. 312; *Rapier v. Gulf City Paper Co. supra*; *Scott v. Henry*, 13 Ark. 112; *Folsom v. Fowler*, 15 Ark. 280; *Desloge v. Ranger*, 7 Mo. 327; *Fowler v. Stoneum*, 11 Tex. 478, 511.

⁶ *Hubby v. Harris* (Tex.), 3 So. W. Rep. 558. And see *Rockwell v. Humphrey* (Wis.) 15 N. W. Rep. 394.

the transaction. If it be provided that such loss or death is at the risk of the vendor, it is apparent that the transaction is a mortgage. And, on the other hand, if such loss or death is at the risk of the vendee, or the privilege to repurchase is made conditional upon the vendee's having the slave or animal, or upon the continued life of the same, without any continuing obligation upon the vendor to pay the price, a conditional sale is indicated.¹

A provision that the person who receives the property shall hold it until a particular day, subject till that time to the risk of the person from whom the property was received if it should be destroyed or lost before that day; but after that day to hold the property free of any claim on the part of the person from whom the property was received, and subject to the holder's own loss if it should be destroyed or lost after that day, indicates a conditional sale.²

32. A vendor who alleges that his absolute bill of sale was intended only as a mortgage must make strict proof of the fact. Having given the transaction this form, he should be bound according to its terms until he shows by evidence clear and convincing that both parties to it really intended it should have a different effect, and that it does not express their real contract.³

A promise under seal by a vendee to his vendor to pay a certain sum of money for a horse, "and to secure him the horse stands his own security," was held to be a conditional sale and not a mortgage.⁴ The court thought it quite apparent that the

¹ *Kentucky*: *Harrison v. Lee*, 1 Litt. 191; *Gray v. Prather*, 2 Bibb, 223; *Bishop v. Rutledge*, 7 J. J. Marsh. 217; *Hart v. Burton*, Ib. 322; *Stone v. Willis*, 4 B. Mon. 496. *Arkansas*: *Williams v. Cheat-ham*, 19 Ark. 278; *Johnson v. Clark*, 5 Ark. 321. *Other States*: *Brown v. Bement*, 8 Johns. (N. Y.) 96; *Berry v. Glover*, 1 Harper Eq. (S. C.) 153; *Mining Co. v. Baker*, 23 Fed. Rep. 258; *Roddy v. Brick* (N. J.), 6 Atl. Rep. 806; *Hubby v. Harris*, (Tex.) 3 S. W. Rep. 558; *Rogers v. Burrus* (Wis.), 9 N. W. Rep. 786; *Nig-geler v. Maurin* (Minn.), 24 N. W. Rep. 369.

² *Critchler v. Walker*, 1 Murph. (N. C.) 488.

³ *Purington v. Akhurst*, 74 Ill. 490; *Sewell v. Price*, 32 Ala. 97; *Brantley v. West*, 27 Ala. 542; *Williams v. Cheat-ham*, *supra*; *Triebler v. Andrews*, 31 Ark. 163.

See *Jones on Mortgages*, § 335.

⁴ *Clayton v. Hester*, 80 N. C. 275. In *Deal v. Palmer*, 72 N. C. 582, a different construction was given to similar words used in a note given for the purchase money of a mule, namely: "The mule to stand security for the price until paid for." The latter case is criticised and disapproved in *Clayton v. Hester*, *supra*; and in *Frick v. Hilliard*, 95 N. C. 117, 120.

parties intended the owner should retain the property, while possession was transferred until the price should be paid, or, in other words, that the title should remain in the seller as security for the price. This was effected by leaving the title in the seller until the condition should be fulfilled. The writing declares that "the horse stands his own security," by which is plainly meant that the property in the horse should remain undisturbed in the vendor. A like construction had previously been put upon similar instruments by the same court. Thus, a note in these words, "Five months after date I promise to pay H. E. the sum of fifty dollars for a horse, said horse to be said H. E.'s till paid for," was held to be a conditional sale.¹ Again, a bond which recited that the obligor had bargained for a filly which is "to stand as security until I pay the vendor for her," promising also to take good care of her, was regarded as doubtful, upon the face of the instrument, whether a mortgage or a conditional sale; and at the trial it was left to the jury to determine its character from the accompanying circumstances. The jury found the instrument to be a conditional sale. The court held that it was properly left to the jury to determine the character of the instrument, as they might find the facts to be whether it was given at the instance of the vendor or of the vendee, and whether it was given before or after the sale had been completed by delivery; for if it was given before any title vested in the purchaser, he could give no title to the property by mortgage, and the instrument must be a conditional sale.²

A note for the purchase of an engine and boiler, providing that it should be a lien upon the property until payment should be made in full, was held not to be a conditional sale, but a mortgage, inasmuch as the title to the property was transferred to the purchaser.³

Again, these words at the foot of a promissory note, "It is agreed and understood that a sorrel mare, for which the above note is given, is to remain the property of the payee until said

¹ *Ellison v. Jones*, 4 Ired. (N. C.) 48.

² *Gaither v. Teague*, 7 Ired. (N. C.) 460.

³ *Frick v. Hilliard*, 95 N. C. 117.

In *Talbott v. Sandifer* (S. C.), 4 S. E. Rep. 152, upon a sale of machinery partly on credit, with a reservation of the title until the price should be paid, it was held,

contrary to the general principle, that the clause providing that the title should not pass until the price should be paid, gave the contract the character of a mortgage instead of a conditional sale.

See, to like effect, *Baldwin v. Crowe* (Ky.), 7 S. W. Rep. 146.

note is fully paid," were held to import a sale to take effect upon the payment of the price, and not a mortgage to secure the price.¹ The same construction was given to a writing which recited the purchase of a filly, which was to stand as the vendor's own right and property until paid for.²

33. Whenever it appears that the parties intended a conditional sale and not a mortgage, the instrument will be so construed,³ notwithstanding the leaning of the courts in favor of construing an instrument which leaves the intention of the parties in doubt to be a mortgage rather than a conditional sale.

There is no difference in point of law between a sale for a price paid or to be paid, to become absolute on the happening of a particular event, and a purchase accompanied by an agreement to resell upon certain agreed terms. In both cases the sale is to be regarded as conditional; and if the condition which is to defeat it be promptly performed, in the one case the title will not vest in the vendee, and in the other it will be divested. If the condition be performed at the stipulated time, not only the *jus ad rem* but the *jus in re* will vest in the party who is to become, by the contract, the proprietor of the thing.⁴

Thus, upon the sale and delivery of property, the vendee gave to the vendor a writing acknowledging he had received the property in trust, the ownership being exclusively vested in the vendor, and stating that, upon the payment of a certain sum, the ownership should then vest in the vendee. The language used was regarded as plainly indicating an intent that the sale and delivery should not divest the vendor's title until the vendee should perform the condition subsequent; and therefore the transaction was a conditional sale.⁵

And so where a debtor gave his creditor a bill of sale of a slave, with an indorsement upon it that the former might have the slave

¹ Ballew v. Sudderth, 10 Ired. (N. C.) 176.

² Parris v. Roberts, 12 Ired. (N. C.) 268.

³ Chapman v. Turner, 1 Call (Va.), 280; Strider v. Reid, 2 Gratt. (Va.) 38; Forkner v. Stuart, 6 Ib. 197; Bracken v. Chaffin, 5 Humph. (Tenn.) 575; Nash v. Weaver, 23 Hun (N. Y.), 513; Hubby v.

Harris (Tex.), 3 So. W. Rep. 558; Morgan v. Kidder, 55 Vt. 367; Budlong v. Cottrell, 64 Iowa, 234.

A conditional sale may be in the form of a lease. Carpenter v. Scott, 13 R. I. 477.

⁴ Sewall v. Henry, 9 Ala. 24, 34, per Collier, C. J.

⁵ Plummer v. Shirley, 16 Ind. 380.

again by paying within a specified time the price for which the sale was made, the circumstances were held to repel the idea of a mortgage, or of a security redeemable at an indefinite period.¹ The old securities were given up, and no new securities were taken; the price paid was a full one; the purchaser himself was necessitous, and obliged to part with the property to pay his own debts, on the day after that limited for the repurchase. Upon such sale he only got his money back; he took immediate possession of the property, while in the case of a mortgage the mortgagee is usually as unwilling to take possession as the mortgagor is to part with it; and finally the seller brought suit to redeem twelve years after the time limited for repurchase. The court remark that if this cannot be considered a purchase, then there can be none, unless it be absolute at the time of making it and forever.

A condition in a bill of sale of slaves that if the purchaser is not satisfied with the negroes, or the negroes are not satisfied with the purchaser, then the seller has the "privilege and authority to redeem the said negroes," whenever he shall return the amount of the purchase money, "or a negro girl to the satisfaction of the purchaser," does not make the instrument a mortgage, but a conditional sale.²

¹ *Poindexter v. McCannon*, 1 Dev. (N. field, 27 Ala. 634; *Freeman v. Baldwin*, C.) Eq. 377; and see *Berry v. Glover*, 1 13 Ala. 246.

Harper Eq. (S. C.) 153; Murphy v. Bare- ² *Chambers v. Hise*, 2 Dev. & B. N. C.) Eq. 305.

CHAPTER II.

REQUISITES IN FORM AND EXECUTION.

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|---|--------------------------------------|
| I. The form of a chattel mortgage, 34-39. | IV. The debt secured, 79-98. |
| II. The parties, 40-52. | V. Special provisions, 99-101. |
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I. *The Form of a Chattel Mortgage.*

34. In general no particular words are required to constitute a mortgage of personal property. All that is requisite in a formal mortgage is that there should be a sale of property by the mortgagor to the mortgagee as security for the payment of a debt, or the performance of some other duty or obligation, with a condition that the sale shall be void upon the payment of such debt, or the performance of such duty or obligation. We have already seen that the most informal instruments will be regarded in law as mortgages, if they show that a sale was made as security; and we have also seen that in equity any sale of chattels as security for a debt is regarded as a mortgage, although the fact that such was the purpose of the sale be not expressed by the instrument of sale, if it be proved by evidence *aliunde*. The form of the sale is immaterial, if in fact it was made as security; only in law this fact must appear upon the face of the instrument, while in equity it need not so appear.¹

¹ The following is a form of a mortgage of personal property with a power of sale. It is in common use in several states, and is doubtless sufficient in all states in which statutes have made no change of the common law doctrines respecting chattel mortgages:—

Know all men by these presents that _____, in consideration of _____, paid by _____, the receipt whereof is hereby acknowledged, do hereby grant, sell, transfer, and deliver unto the said _____ the following goods

and chattels, namely: To have and to hold all and singular the said goods and chattels to the said _____ and executors, administrators, and assigns, to their own use and behoof forever.

And I hereby covenant with the grantee that I am the lawful owner of the said goods and chattels; that they are free from all incumbrances _____, that have good right to sell the same as aforesaid; and that _____ will warrant and de-

A chattel mortgage, in the form prescribed by statute for a mortgage of real estate, is valid and sufficient in respect to its form to vest in the mortgagee an interest in the property, according to the apparent intent of the parties.¹ An instrument intended by the parties to operate as an agricultural lien, under a statute which fails to set out some matter essential to its taking effect as a statutory lien, will be given effect as a chattel mortgage if sufficient for that purpose.²

35. In a few states there are statutory forms; but these forms are not exclusive of other forms. They are only forms that may be used. They have generally been enacted in the interest of brevity and simplicity in conveyances, and are useful as showing how brief and simple a form may be used.³

fend the same against the lawful claims and demands of all persons.

Provided, nevertheless, that if _____, or executors, administrators, or assigns, shall pay unto the grantee _____, or executors, administrators, or assigns, the sum of _____ in _____ from this date, with interest semi-annually at the rate of _____ per cent. per annum; and until such payment shall not waste or destroy the said goods and chattels, nor suffer them or any part thereof to be attached on mesne process; and shall not, except with the consent in writing of the grantee or representatives, attempt to sell or to remove from _____ the same or any part thereof, — then this deed, as also note of even date herewith, signed by whereby _____ promise to pay to the grantee or order the said sum and interest at the times aforesaid, shall be void.

And it is agreed that until default in the performance of the condition of this deed, _____ and _____ executors, administrators, and assigns, may retain possession of the above mortgaged property, and may use and enjoy the same.

In witness whereof _____ hereunto set hand and seal this _____ day of _____ in the year one thousand eight hundred and eighty-_____.

¹ Sidener v. Bible, 43 Ind. 230.

² Spivey v. Grant, 96 N. C. 214; 2 S.

E. Rep. 45; Rawlings v. Hunt, 90 N. C. 270. But if the instrument was intended to operate as an agricultural lien, and embodies all the requisite elements, it will be enforced as such, though it contains words of conveyance, and is in the form of a chattel mortgage. Townsend v. McKinnon, 98 N. C. 103; 3 S. E. Rep. 836.

³ In California (Civil Code, § 2957), and Dakota Territory (Rev. Codes 1877; § 1742 of Civil Code), a mortgage of personal property may be made in substantially the following form: This mortgage, made the _____ day of _____, in the year _____, by A. B. of _____, by occupation a _____, mortgagor, to C. D. of _____, by occupation a _____, mortgagee, witnesseth: That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of _____ dollars, on (or before) the _____ day of _____, in the year _____, with interest thereon (or, as security for the payment of a note or obligation, describing it, &c.). A. B.

In Maryland (Code 1878, art. 44, §§ 65 and 51) the following form, or a form to like effect, is sufficient, and any covenant, limitation, restriction, or proviso allowed by law may be added, annexed to, or introduced with the same: I _____, of _____ county, Maryland, being now indebted to _____ of _____ county, in the sum of _____

In Dakota ¹ a mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed.

In Georgia ² no particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the debt to secure which it is given, and the property upon which it is to take effect. It must be executed in the presence of, and be attested by, or proved before, a notary public, or justice of any court in this state, or a clerk of the Superior Court.³

36. In several states an affidavit verifying the essential facts or recitals of the mortgage, or that the mortgage is given in good faith, or that the consideration is truly stated, must be affixed to the instrument.

Thus in Arizona Territory ⁴ a chattel mortgage has no legal force or effect except between the parties thereto, unless the residence of the mortgagor and mortgagee, the sum to be secured, the rate of interest to be paid, when and where payable, are set out in the mortgage; and unless the mortgagor and mortgagee make affidavit that the mortgage is *bonâ fide*, and made without any design to defraud or delay creditors. The affidavit must be attached to such mortgage.

In California ⁵ a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless it is accompanied by the affidavit of all the parties thereto, that it is made in good faith and without any design to hinder, delay, or

dollars, with interest from _____, in consideration thereof, do hereby bargain and sell to the said _____, the following property (here describe property). *Provided*, that if I, the said _____, shall pay to the said _____ the said sum of _____ dollars, with the interest thereon, on or before the _____ day of _____, then these presents shall be void. Witness my hand and seal, this _____ day of _____.

[Seal.]

A mortgage of personal property is deemed to contain an implied covenant, unless the contrary is therein expressed, by the mortgagor to pay the debt and interest specified in the mortgage.

¹ Rev. Codes 1877; § 1749 of Civil Code.

² Code 1882, § 1955; *Jaffrey v. Brown*, 29 Fed. Rep. 476.

³ It is not necessary that a notary public shall affix his seal to the probate of a deed by a subscribing witness. *Nichols v. Hampton*, 46 Ga. 253. The fact that the notary was a brother-in-law of the mortgagee does not invalidate the mortgage. *Welsh v. Lewis*, 71 Ga. 387. It is immaterial whether the attesting witness sign individually or officially as notary public. *Janes v. Penny*, 76 Ga. 796.

⁴ R. S. 1887, § 2364.

⁵ Civil Code, § 2957.

defraud creditors; and unless it is acknowledged or proved, certified and recorded, in like manner as grants of real estate.¹

In Delaware² no mortgage is valid unless there be indorsed upon or annexed to it, and recorded with it, an affidavit that the said mortgage was made for the *bonâ fide* purpose of securing a debt, or making indemnity, as the case may be, and was not made to cover the property of the mortgagor, or protect it from his creditors, or to hinder or delay them in the collection of their debts.

In Idaho Territory a mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith and for value, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors.³

In Maryland⁴ no bill of sale or mortgage of personal property is valid, except as between the parties, unless the bargainee, or vendee, or mortgagee, or some one of them, or the agent of some one of them, shall make the affidavit required to be made by mortgagees of real estate. The affidavit so required is an oath or affirmation of the mortgagee that the consideration in said mortgage is true and *bonâ fide*, as therein set forth. This affidavit may be made at any time before the mortgage is recorded, before any one authorized to take the acknowledgment of a mortgage, and the affidavit shall be recorded with the mortgage.⁵

In New Jersey every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation, made and subscribed by the holder or holders of said mortgage, his, her, or their agent or attorney, stating the consideration of said mortgage and as nearly as pos-

¹ The affidavit need not be signed by the party making it. *Ede v. Johnson*, 15 Cal. 53.

² Laws 1877, ch. 477, § 4.

³ R. S. 1887, § 3386. So, also, in Mon-

tana Territory, § 215; in Nevada, § 217; and in Utah Territory, § 229 *a*.

⁴ Rev. Code 1878, art. 44, § 54.

⁵ *Ibid.* § 35.

sible the amount due and to grow due thereon, be recorded as directed.¹

In Ohio,² the mortgagee, his agent or attorney, shall, before the instrument is filed, state thereon, under oath, the amount of the claim, and that it is just and unpaid, if given to secure the payment of a sum of money only, and if given to indemnify the mortgagee against liability as surety for the mortgagor, such sworn statement shall set forth such liability, and that the instrument was taken in good faith to indemnify against loss that may result therefrom. The omission of such statement renders the mortgage void as against the creditors of the mortgagor.³ The form of the affidavit is immaterial if it contain the requisite facts. It may refer to matters contained in the mortgage, and the matters thus referred to will be regarded as part of the affidavit. Where a mortgage is given to secure the mortgagee against liability as surety for the mortgagor, and also to secure a debt of a third person, an affidavit which shows the nature and amount of the liability of the mortgagee as surety, as well as the amount of the other debt secured, and that the mortgage was executed in good faith to secure both obligations, is sufficient.⁴

37. New Hampshire⁵ and Vermont.—In the former state, each mortgagor and mortgagee must make and subscribe an affidavit in substance as follows:⁶ “We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the condition thereof, and for no other purpose whatever, and that said debt was not created for the purpose of enabling the mortgagor to execute said mortgage, but is a just debt, honestly due, and owing from the mortgagor to the mortgagee.”⁷

¹ Supp. to Rev. 1886, p. 491, § 11, being Chattel Mortgage Act of 1885. See *Field v. Silo*, 44 N. J. L. 355.

² R. S. 1880, § 4154; 66 Ohio Laws, 345, Act May 7, 1869.

³ *Hanes v. Tiffany*, 25 Ohio St. 549; *Blandy v. Benedict*, 42 Ohio St. 295.

⁴ *Gardiner v. Parmalee*, 31 Ohio St. 551; *Nesbit v. Worts*, 37 Ohio St. 378. A statement not signed is sufficient if sworn to. *Gambrinus Stock Co. v. Weber*, 41 Ohio St. 689.

⁵ G. S. 1878, ch. 137, §§ 1-18.

⁶ Inasmuch as the statute requires that

the mortgagor and mortgagee shall *subscribe* the affidavit, it is not a compliance with the statute for them to write their names in the body of the affidavit. *Stone v. Marvel*, 45 N. H. 481.

⁷ An affidavit by the mortgagor only is insufficient, and does not entitle the instrument to be recorded. *Lovell v. Osgood*, 60 N. H. 71.

The omission of the words “So help us God” at the end of the affidavit does not invalidate the mortgage. *Comey v. Pickering*, 63 N. H. 126.

Where copartners are parties to mortgages of personal property, the affidavit required may be made and subscribed by any partner in behalf of the firm.¹ Where a corporation is a party to such mortgage the affidavit required may be made and subscribed by any director thereof, or any person authorized on the part of such corporation to make or receive such mortgage.²

If such mortgage is given to indemnify the mortgagee against any liability assumed, or to secure the fulfilment of any agreement other than for the payment of a debt due from the mortgagor to the mortgagee, such liability or agreement shall be stated truly and specifically in the condition of the mortgage, and the affidavit shall be so far varied as to verify the validity, truth, and justice of such liability or agreement.³

Such affidavit, with the certificate of the justice who administered the oath, must be made upon the mortgage and recorded with it.

Under this statute a mortgage cannot be given to secure the debt of a third person. If given to secure a debt, it must be a debt due from the mortgagor to the mortgagee; if to secure a liability, it must be a liability incurred by the mortgagee for the mortgagor; and if to secure any other agreement, it must be one between the parties to the mortgage.⁴ The oath must conform to the purpose of the mortgage, and must be varied to suit the obligation secured. It must verify the truth, validity, and justice of the debt, or of the liability, or of the agreement, as the case may be.⁵ If the mortgage secure a debt to the mortgagee, and also a liability incurred by him, and the oath describe both obligations in the same way as debts due the mortgagee, the mortgage will be valid to secure the debt, but void as against creditors, so far as it was intended to secure the liability incurred.⁶ If the affidavit

¹ An affidavit signed by one member of the firm in the firm name is sufficient. *Randall v. Baker*, 20 N. H. 335. If the magistrate certify that A. & B. (the copartners) took the oath, he in effect certifies that both the members of the firm so designated took the oath; and it is not necessary to this construction that he should certify that they were "severally" sworn.

² When a mortgage is taken by a town to secure a debt due it, the affidavit on be-

half of the town may be made and subscribed by one selectman, for he is one of its agents intrusted with the management of its financial affairs. *Sumner v. Dalton*, 58 N. H. 295.

³ *Phillips v. Johnson* (N. H.), 10 Atl. Rep. 819.

⁴ *Parker v. Morrison*, 46 N. H. 280; *Tarbell v. Jones*, 56 Vt. 312.

⁵ *Parker v. Morrison*, *supra*.

⁶ *Parker v. Morrison*, *supra*; *Belknap v. Wendell*, 31 N. H. 92.

speak of the debt only, the mortgage will be good as to that, although invalid as a security for the liability.¹

The true character of the mortgage, as given to secure a debt, or a contingent liability, or a special agreement, must be stated in the condition and verified in the affidavit. Although a note for a given sum may be valid as an indemnity for a contingent liability, if it be secured by mortgage, the true character of the note as an indemnity must be stated in the condition;² and if not so stated and verified by oath, the mortgage will be invalid against creditors.³

If a chattel mortgage and note be given as collateral security for another debt of the mortgagor also secured by mortgage, the affidavit should disclose this fact. If the debt be described in the mortgage and affidavit as an absolute debt, the mortgage will be invalid as against the mortgagor's creditors.⁴

The form of the oath prescribed for the execution of a chattel mortgage precludes its being made to secure future claims.⁵

In Vermont the statute differs but slightly from that of New Hampshire, on which it was based.⁶ Each mortgagor and mortgagee shall make and subscribe an affidavit in substance as follows: "We severally swear that the foregoing mortgage is made for the purpose of securing the debt specified in the conditions thereof, and for no other purpose whatever, and that the same is a just debt, honestly due and owing from the mortgagor to the mortgagee." This affidavit, with the certificate of the oath signed by the authority administering the same, shall be made upon, or appended to, such mortgage, and recorded therewith. When a corporation is a party to such mortgage, the affidavit required may be made and subscribed by any director, cashier, or treasurer thereof, or by any person authorized on the part of such corporation to make or receive such mortgage. If such mortgage is given to indemnify the mortgagee against any liability assumed, or to secure the fulfilment of any agreement other than the payment of a debt due from the mortgagor to the mortgagee, such liability or agreement shall be stated truly and specifically in the con-

¹ *Sumner v. Dalton*, 58 N. H. 295. See *Belknap v. Wendell*, 31 N. H. 92, 101.

² *Belknap v. Wendell*, *supra*; *Tarbell v. Jones*, 56 Vt. 312.

³ *Belknap v. Wendell*, *supra*.

⁴ *Kennard v. Gray*, 58 N. H. 51.

⁵ *Page v. Ordway*, 40 N. H. 253.

⁶ *Laws* 1878, p. 58, §§ 3, 4, 5; *R. L.* 1880, §§ 1967-1969. Affidavit may be by one partner; or by agent. *Acts* 1886, p. 63.

dition of the mortgage, and the affidavit shall be so far varied as to verify the validity, truth, and justice of such liability or agreement.

38. Possession by the mortgagee dispenses with the necessity of an affidavit. The purpose of the statute in requiring the affidavit is to guard against the making of fraudulent or fictitious mortgages, which would enable the mortgagor to retain possession of the property and set his creditors at defiance.¹ Therefore, the omission of the affidavit does not invalidate the mortgage as against a subsequent purchaser or mortgagee, or an attaching creditor, provided the mortgagee has taken and retained possession of the property. Such possession is notice of the mortgagee's interest.²

A mortgage of chattels without the affidavit required by statute is valid against a subsequent purchaser, with notice that the mortgage was made in good faith and for a full consideration.³

39. A statute forbidding the making of a second mortgage of personal property, without a reference in it to the first, does not make the second mortgage executed in violation of this statute void, for its object is to secure the rights of the second mortgagee, and this would be defeated by holding the mortgage void. The parties do not stand *in pari delicto*. The mortgagee might avoid the mortgage, if he was a sufferer, but it cannot be avoided by the mortgagor. There is a statute to this effect in New Hampshire.⁴ It provides that no mortgagor shall execute any second or subsequent mortgage of personal property while the same is subject to a previously existing mortgage or mortgages given by such mortgagor, unless the fact of the existence of such previous mortgage or mortgages is set forth in the subsequent mortgage. There is a statute in the same terms in Vermont.⁵

¹ Gooding v. Riley, 50 N. H. 400, per Bellows, C. J.

² Gooding v. Riley, *supra*; Clark v. Tarbell, 57 N. H. 328; overruling dictum to the contrary in Janvrin v. Fogg, 49 N. H. 340.

³ Roberts v. Crawford, 58 N. H. 499; Sanborn v. Robinson, 54 N. H. 239.

⁴ Leach v. Kimball, 34 N. H. 568; Gen. Laws 1878, c. 137, § 14.

⁵ Laws 1878, p. 59, § 9; R. L. 1880, § 1973.

II. *The Parties.*

40. An infant's mortgage is not void but voidable. It is binding until it is avoided. Any act of his clearly showing his intention not to be bound by the mortgage is a sufficient avoidance of it. An unconditional sale of the mortgaged property is such an act. He may avoid the mortgage before he is of age, or afterwards; but he must disaffirm it within a reasonable time after attaining his majority. What would be a reasonable time would depend upon circumstances; and where there are various circumstances to be passed upon as matters of fact, the question is one for the jury to determine under the instructions of the court.¹

If the property be taken from the infant's possession by virtue of such a mortgage, he may disaffirm the contract and reclaim the property.²

Moreover, an infant may disaffirm his mortgage without returning the money borrowed upon it, the mortgage not having been given for purchase money, or for the purchase of articles necessary for his use. If he could not repudiate the transaction except upon the condition of returning the loan, the privilege which the law accords to infancy for its protection would be of little benefit. "Under the operation of such a rule, money lenders would soon become permanently possessed of the property of infant spend-thrifts; for with them the temptation to borrow for immediate gratification is generally too great to be resisted. Its adoption as a rule would be in violation of the principle of protection that underlies the whole doctrine of the law pertaining to the dealings and contracts of infants."³

¹ *State v. Plaisted*, 43 N. H. 413; *Miller v. Smith*, 26 Minn. 248; *S. C.* 2 N. W. Rep. 942; *Chapin v. Shafer*, 49 N. Y. 407, per Peckham, J. "By a rule of the common law it is declared that where the contract or instrument is to the disadvantage of the infant it is void; that no contracts of infants are void except those in which it would be better for the infant, as a general principle, that they should be so held. It is difficult to see how, as a general principle, it can be advantageous to an infant to give a mortgage upon personal property at a short date to secure an old debt,

which, as a general rule, puts a mortgagor in embarrassed circumstances quite in the power of the mortgagee, certainly in most cases to sacrifice the property at a forced sale. Giving a mortgage to secure the purchase money of property is a different thing. The end of the rule is the protection of the infant. But I do not rest the case upon this ground, as the tendency of modern authorities is to make nearly all deeds or contracts of infants not void, but voidable."

² *Miller v. Smith*, *supra*.

³ *Miller v. Smith*, *supra*, per Cornell,

Mr. Justice Cooley, in refutation of the same idea,¹ says if it be correct, "the privilege of infancy is absolutely without avail in every case of a voidable contract where the infant is not in position to restore such consideration as he may have received for it. If he borrows money and improvidently disposes of it, as the law from his want of discretion presumes he may do, this very indiscretion, which the law endeavors to shield and protect, becomes the means of fastening the imperfect obligation irrevocably upon him, and his inability to refund what he has borrowed affirms his contract to repay it with interest. It is needless to say that there is no privilege and no protection in any such rule."

An infant who has bought personal property, and given back a mortgage for a part of the purchase money, may upon coming of age avoid the mortgage; but by so doing he annuls the sale to himself, and cannot claim the property by virtue of it.² The sale and the mortgage amount in law to one transaction, and one part of it cannot be disaffirmed without also disaffirming the other. Thus, an infant having purchased a horse and paid part of the consideration, and given a mortgage upon it for the balance, he cannot maintain trespass against the mortgagee or his assignee for taking the horse by virtue of the mortgage, on the ground that the mortgage was given during his minority, and therefore void.³ In seeking to avoid the mortgage in this way, he loses the benefit of the payment he has made upon the purchase of the horse. If he would avoid the mortgage and recover the amount he has paid upon the purchase, he should repudiate the whole transaction, both the sale and the mortgage, and demand the money paid; or he should pay the mortgage and then make a tender of the horse, and having done this he would be in a situation to recover all he had paid of the purchase money. But instead of fulfilling his contract he cannot hold the horse and repudiate his mortgage.⁴

Upon the same principle, a surety upon an infant's notes for purchase money of chattels, who has paid a judgment upon the notes and received from the infant a note for the amount so paid,

J.; *Green v. Green*, 7 Hun (N. Y.), 492; and see *Riley v. Mallory*, 33 Conn. 201, 206.

¹ *Corey v. Burton*, 32 Mich. 30.

² *Heath v. West*, 28 N. H. 101; *Roberts v. Wiggin*, 1 N. H. 73; *Curtiss v. McDougall*, 26 Ohio St. 66; *Skinner v. Maxwell*,

66 N. C. 45; *Corey v. Burton*, *supra*; *Cogley v. Cushman*, 16 Minn. 397, 402.

See *Jones on Mortgages*, §§ 104, 105.

³ *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 428.

⁴ *Heath v. West*, *supra*; *Carr v. Clough*, 26 N. H. 280.

secured by mortgage of the same chattels, is entitled to hold the property as against a subsequent purchaser from the infant with knowledge of the mortgage. The indebtedness so contracted should be treated as a debt for a part of the purchase money ; for, if regard be had to the essence of the transaction rather than the form of it, this is really what it amounts to.¹

41. A mortgage made by an insane person is not binding upon him in law or equity. The contract is voidable. To a suit brought to avoid such contract, it is no defence that the defendant, at the time he took the mortgage, was not apprised of the plaintiff's insanity, or had no reason to suspect it from his conduct or otherwise, and did not overreach him, or practise any fraud or unfairness in the transaction.²

If the mental unsoundness of the mortgagor had not been judicially determined at the time the mortgage was executed, the title vests in the mortgagee with the right of possession upon a default ; and if the mortgagee obtains possession under the mortgage, his possession is not wrongful ; and before an action can be maintained to recover the property from him, there must be a disaffirmance in behalf of the mortgagor.³

42. In general it may be said that a married woman may make a valid mortgage of chattels which are her separate property.⁴ The common law disabilities of married women have been in large part removed in this country by statutes which enable them to take and hold property by gift or purchase, and to contract with reference to such property as if sole.

A mortgage by a married woman of goods, of which she avouches herself to be the lawful owner, but which really belong to her husband, passes no title such as will enable the mortgagee to replevy the goods from a third person, although the husband has indorsed on the mortgage his formal sanction of it, with a declaration that his wife acted as his agent. Such ratification

¹ *Knaggs v. Green*, 48 Wis. 601 ; *S. C.*
⁴ N. W. Rep. 760.

² *Seaver v. Phelps*, 11 Pick. (Mass.)
304.

See *Jones on Mortgages*, § 103.

³ *Fay v. Burditt*, 81 Ind. 433.

⁴ For a discussion of the rights and dis-

abilities of married women with reference to mortgages of their real property, see *Jones on Mortgages*, §§ 106-118. Much that is there stated applies equally to mortgages of personal property by married women

supplied whatever authority was necessary to give validity to the execution of the instrument by the wife; but it did not change the character of the instrument so as to give it an effect which its own terms did not import. It did not purport to convey his property at all, but her property. Therefore the mortgagee could not replevy the goods from an officer who had attached them as the property of the husband, for he must maintain his action on the strength of his own title.¹

If a husband executes a mortgage upon property of his wife to secure his own debt, without her knowledge or consent, the wife is not estopped from setting up her ownership when the mortgagee takes possession of the property.² The mere fact that the husband executed such a mortgage does not tend to show that he owned the property, or that it was given for his wife's benefit.³

42 a. A husband cannot execute a valid mortgage of personal property belonging to his wife; and though he recites in the mortgage that the property is his own, he is not estopped from setting up his wife's title, and the invalidity of his mortgage. He has no power to make such a mortgage, and the estoppel only prevents his denying that he has done what he had no power to do.⁴

43. Whether a husband may make a valid chattel mortgage to his wife, or a wife may make such a mortgage to her husband of her separate estate, depends upon the statutes relating to married women, and the interpretation of such statutes. Such a mortgage is valid in Wisconsin,⁵ Iowa,⁶ and Kansas,⁷ and in a contest between a married woman and her husband's creditors, the burden of showing a valuable consideration paid out of her separate estate, or by some other person for her, is upon the wife; but that being shown, the burden of showing fraudulent intent is upon the creditor.⁸

But a husband may make a valid mortgage to a third person to

¹ *Lewis v. Buttrick*, 102 Mass. 412.

² *Taylor v. Riley*, 37 Kans. 90.

³ *Gavigan v. Scott*, 51 Mich. 373.

⁴ *McIntosh v. Parker*, 82 Ala. 238. This is so in Alabama as regards the wife's statutory estate, although the husband holds it as trustee for his wife.

⁵ *Fenelon v. Hogoboom*, 31 Wis. 172.

⁶ *Headington v. Langland*, 65 Iowa, 276.

⁷ *Miller v. Krueger*, 36 Kans. 344; *Bailey v. Kansas Manuf. Co.* 32 Kans. 73.

⁸ *Hoey v. Pierron*, 67 Wis. 262.

secure a loan made him by his wife of money which was her sole and separate estate; and if such third person assign it to the wife by an assignment in the usual form, but without indorsing the mortgage note, the wife may maintain trover against an officer who has attached the property on a writ against the husband.¹ She could not, of course, foreclose the mortgage while her husband continued to own the equity of redemption, because she could not be a party to an action against him; but, being the legal and lawful holder of the mortgage, she could maintain any action necessary to protect her title or possession against a third person.² Such a mortgage would be without legal consideration in case the money loaned by the wife were not, under the existing laws, her separate property, but property which the husband had the right to reduce to possession and use.³

44. A mortgage by partners upon partnership property to secure an individual debt of one of the partners is valid. The rule preferring partnership property for the payment of partnership debts is for the benefit of the partners, and they may waive it. The giving of such a mortgage is itself a waiver.⁴ The partners, while the partnership property is still under their control, have power to appropriate it to secure their individual debts. The mere preference of individual debts by mortgage to secure them over partnership debts is not such a fraud upon partnership creditors that a court of equity will set it aside.⁵ The partnership creditors have no lien on the property of the partnership, if the partners themselves have none.⁶

45. One member of a copartnership may mortgage his interest in the firm to secure his own individual debt. Such a mortgage is, of course, subject to the prior equities of the part-

¹ *Degnan v. Farr*, 126 Mass. 297. If the note had been indorsed so as to pass the legal title in it to the wife, it might have been extinguished in law, because of her incapacity to be a party to a contract with, or to an action against, her husband. *Chapman v. Kellogg*, 102 Mass. 246.

² *Degnan v. Farr*, *supra*, per Gray, C. J.

³ *Phillips v. Frye*, 14 Allen (Mass.), 36.

⁴ *In re Kahley*, 2 Biss. 383; *Carver Gin & M. Co. v. Bannon*, 85 Tenn. 712; and see *Kirby v. Schoonmaker*, 3 Barb. (N. Y.) Ch. 46; *Fisher v. Syfers* (Ind.), 10 N. E. Rep. 306.

⁵ *National Bank v. Sprague*, 20 N. J. Eq. 13; *Kennedy v. Nat. Union Bank*, 23 Hun (N. Y.), 494.

⁶ *Jones on Liens*, § 788; *Carver Gin & M. Co. v. Bannon*, *supra*.]

nership creditors. If after such a mortgage the partnership business be closed, and a receiver of it appointed, in whose hands, after settling the affairs of the firm, there remains a surplus to the credit of the members of the firm, such surplus will belong to the mortgagee in preference to the assignee in bankruptcy of the mortgagor.¹ A mortgage by one partner of specific partnership property, to secure his individual debt, confers no title or lien upon that property as against the partnership or its creditors, but only a right to the mortgagor's interest therein after the partnership debts are paid.²

A mortgage by an individual partner, for his own purposes, of all his right, title, and interest in and to the real estate and other property of the firm, imposes no actual lien upon the property itself, or upon any part of it. The corpus is joint property. The interest of an individual partner consists only of his share in the surplus remaining after the payment of the debts and settlement of the accounts of the firm. It is not until that interest is ascertained definitely, and set apart as the share of the mortgagor, that his mortgage is available against any specific property.³

Such a mortgage is held to be subject to a lien created by a stipulation in the contract of copartnership, that one partner shall have a lien upon the property of the firm as indemnity for any liability he may incur as surety for the other. The mortgagee is charged with notice of such stipulation.⁴

A mortgage of partnership property, executed by one partner to secure his individual debt, may be ratified and confirmed by his copartner, so as to be an effectual mortgage by the partnership.⁵

A debt incurred by a partnership for the accommodation of one of the partners, is a partnership debt; and, as against him, moreover, the other members of the partnership would have a lien on the partnership effects for the payment of such debt. Therefore, where a partnership borrowed money for the accommodation of

¹ Thompson v. Spittle, 102 Mass. 207. See Monroe v. Hamilton, 60 Ala. 226; Smith v. Andrews, 49 Ill. 28. Under the English Bills of Sale Act of 1854, a mortgage by a partner of his share in a partnership was regarded as an assignment of a chose in action, and not within the act. *In re Bainbridge*, 8 Ch. D. 218.

² Nichol v. Stewart, 36 Ark. 612; Mo-

line Wagon Co. v. Rummell, 2 McCrary, 307; S. C. 12 Fed. Rep. 658; Clements v. Jessup, 36 N. J. Eq. 569.

³ Tarbel v. Bradley, 7 Alb. (N. Y.) N. C. 273.

⁴ Lewis v. Harrison, 81 Ind. 278.

⁵ Kennedy v. Nat. Union Bank, 23 Hun (N. Y.), 494.

one of the two partners, who executed to the other a mortgage on his interest in the partnership property as security, and the latter paid the debt, it was held that his lien on the partnership property, for the sum so paid, was not dependent on the mortgage or its registration, but was superior to the lien of a prior unrecorded mortgage, of which he had no notice, given by his copartner for his individual debt, and recorded before the mortgage to the partner was recorded.¹

A member of an unincorporated joint stock company representing an interest in real and personal property may mortgage his equitable interest in the property. Such a mortgage would convey the member's proportion of the joint property, subject to the debts of the association and to the equities of its other members.²

46. One partner may execute a valid mortgage of partnership goods to secure a partnership debt, by signing the firm name, or the individual names of the members of the firm.³ One copartner having authority to pass a valid title to such property by bill of sale may, as incident thereto, execute a transfer of it in any form or mode by which such title could in any case be legally transferred. It is immaterial whether he sign the name of each copartner separately, or sign the firm name.⁴ The addition of a seal to the individual names does not invalidate the mortgage, because a seal is unnecessary.⁵ Therefore if one partner, being authorized to execute a mortgage of personal property, affix his own name and seal to a mortgage whose *testatum* clause sets forth that the firm by such partner, one of the firm, had thereto set their hands and seals, the instrument may be regarded as the deed of all the partners, upon proof of such partner's prior authority, or

¹ Warren v. Taylor, 60 Ala. 218.

² Durkee v. Stringham, 8 Wis. 1.

³ Patch v. Wheatland, 8 Allen (Mass.), 102; Nelson v. Wheelock, 46 Ill. 25; Gates v. Bennett, 33 Ark. 475; Bohler v. Tappan, 1 Fed. Rep. 469; Walker v. White, 60 Mich. 427.

* Johnson v. Nelson (Ohio Com. Pleas, 1861), 3 West. L. M. 306; Mabbett v. White, 12 N. Y. 442; Graser v. Stellwagen, 25 N. Y. 315; Cooley v. Hobart, 8 Iowa, 358; Patterson v. Maughan, 39 U.

C. Q. B. 371; Halpenny v. Pennock, 33 U. C. Q. B. 229.

⁵ Milton v. Mosher, 7 Met. (Mass.) 244; Tapley v. Butterfield, 1 Met. (Mass.) 515; Lamb v. Durant, 12 Mass. 54; Hawkins v. Hastings Bank, 1 Dill. 462; S. C. 2 N. Bank, R. 337; Purviance v. Sutherland, 2 Ohio St. 478; Sweetzer v. Mead, 5 Mich. 107; Woodruff v. King, 47 Wis. 261; S. C. 2 N. W. Rep. 452.

See, however, Weeks v. Mascoma Rake Co. 58 N. H. 101.

of the subsequent assent of the other partners.¹ It seems, moreover, that the general authority a partner has to sell and dispose of partnership goods, in the regular course of business, and the authority he has to pay the debts of the firm, and to apply the property of the firm for that purpose, is authority for his mortgaging the partnership property, to raise money for that purpose.² At any rate, the acquiescence of the other partners in such an act would place the validity of it beyond question, and it does not matter whether the acquiescence be given at the time of the transaction or subsequently.³ But there are well considered decisions which go to the extent of holding that one partner has authority to transfer all the partnership effects to a creditor of the firm in payment of a debt, without the knowledge or consent of his copartner, although the latter be at the place of business of the firm, and might have been consulted, but was not ;⁴ and that one partner may do this, even against the protest of his copartner.⁵

But if chattels owned by one partner be used by the firm without being converted into partnership assets, and the other partner without the owner's knowledge mortgages them for a partnership debt, such mortgage is of no validity as against the owner, or any one claiming under him.⁶

On the dissolution of a partnership by the death of a partner, the sole surviving partner may mortgage the partnership property to secure a partnership debt, and when this is done in good faith, the mortgage is effectual against the partnership creditors, as well as against the representatives of the deceased partner.⁷

But a mortgage made by one partner without the knowledge or consent of the other members of the firm is not valid if it be not in furtherance of the partnership business. Thus, where partners had agreed upon an assignment for the benefit of creditors, and one partner had executed a deed of assignment, and the other partner within two hours afterwards executed a mortgage of the

¹ *Gibson v. Warden*, 14 Wall. 244; *Tapley v. Butterfield*, 1 Met. (Mass.) 515.

² *Tapley v. Butterfield*, *supra*; *Fromme v. Jones*, 13 Iowa, 474; *Nelson v. Wheelock*, 46 Ill. 25; *Richardson v. Lester*, 83 Ill. 55. But the execution of a mortgage of partnership property by one partner in his individual name passes no title. *Clark v. Houghton*, 12 Gray (Mass.), 38.

³ *Skinner v. Dayton*, 19 Johns. (N. Y.) 513; *Smith v. Kerr*, 3 N. Y. 144; *Cady v. Shepherd*, 11 Pick. (Mass.) 400; *Swan v. Stedman*, 4 Met. (Mass.) 548. And see *Richardson v. Lester*, 83 Ill. 55.

⁴ *Mabbett v. White*, 12 N. Y. 442.

⁵ *Graser v. Stellwagen*, 25 N. Y. 315.

⁶ *Cutler v. Hake*, 47 Mich. 80.

⁷ *Bohler v. Tappan*, 1 Fed. Rep. 469.

stock in trade of the firm to secure a note given for a partnership debt and made payable the next day, it was held that the mortgage was invalid. The effect of the mortgage would be to terminate the business of the firm and end its life; and this power is not possessed by one partner. The assignment, on the other hand, having been agreed upon by the firm, could be executed by either partner, and the same was valid.¹

47. One tenant in common of personal property may mortgage his interest in it, and the mortgagee becomes a tenant in common in place of the mortgagor, and consequently the mortgagee cannot take the property by replevin from the other joint owner.²

An agreement by the other tenant in common to pay such mortgage, or an actual payment by him, will not of itself bring his own interest within the mortgage lien.³

48. Whether a mortgage executed by two persons jointly to secure their several notes changes their liability upon the notes to a joint liability is a question that has sometimes arisen. Thus a mortgage upon a steamboat, executed by two persons to secure a portion of the purchase money, reciting a condition to pay an equal number of individual notes of each for like amounts, amounting, together, to the sum of \$7,000, "and that said mortgagors promise to pay the said sum of \$7,000 as above," was held not to change the liabilities of the mortgagors as expressed by their notes. The object and effect of the mortgage were merely to secure the performance of the undertaking of the mortgagors as expressed by their individual notes, without changing the terms of their undertaking.⁴

49. A mortgage may be made to several persons jointly to secure them severally as creditors of the mortgagor, or as indorsers for him upon several notes, and not as joint creditors or joint indorsers upon one note.⁵ The condition in such a mortgage, that the mortgagor shall pay all notes upon which the mortgagees are

¹ *Osborne v. Barge*, 29 Fed. Rep. 725.

² *Keables v. Christie*, 47 Mich. 594.

³ *Smith v. Rice*, 56 Ala. 417; *Shuart v.*

⁴ *Kelley v. Maxwell*, 7 Ohio St. 239.

Taylor, 7 How. (N. Y.) Pr. 251; *Gaar v.*

⁵ *Sumner v. Dalton*, 58 N. H. 295; *Adams v. Niemann*, 46 Mich. 135.

Hurd, 92 Ill. 315; *Melin v. Reynolds*, 32 Minn. 52; *Miller v. Darling*, 22 Minn. 303.

holden as sureties, secures them as indorsers for the mortgagor of any notes, whether all their names be upon the same notes or not.¹

A mortgage may be made to secure separate debts due to several persons, and if each debt is clearly set forth, each creditor may, upon breach of the condition as to him, maintain any appropriate proceeding to enforce his claim under the mortgage; and it does not matter that the mortgage is made to one creditor for his own benefit, and as trustee for other creditors named.²

If the mortgage debt is an entirety, though made up of several notes payable to several persons and maturing at different times, the mortgage is not a separate mortgage to each holder of one of such notes, but the whole debt is secured by one mortgage, and one note-holder has no right to take possession when his note becomes due, but only upon the maturity of the last note secured.³

If a mortgage be given to several persons, to secure the payment of several debts owing by the mortgagor, and by the express terms of the instrument the whole is to become forfeited by a single default, upon the happening of default in the payment of either of the debts, the property becomes forfeited to the holders of the mortgage jointly, and they become tenants in common of the whole property. Neither of the mortgagees has any sole and several right to the mortgaged property which will authorize him to appropriate it to his own use. Neither of them can sell the entire property, but only his interest in it.⁴

Where a mortgage has been given to secure two notes to different holders, and the mortgagees seek to reduce the property to possession by replevin under a clause giving them this right whenever they should feel themselves insecure, they must sue jointly, as they are joint owners.⁵

50. If several mortgages of the same date be delivered simultaneously, each providing that neither shall have precedence of any other, but that all are equal securities, the several mortgagees take title as tenants in common, and may join in one

¹ *Wheeler v. Nichols*, 32 Me. 233.

² *Walker v. White*, 60 Mich. 427; *Gilson v. Gilson*, 2 Allen (Mass.), 115; *Adams v. Niemann*, 46 Mich. 137.

³ *Gaar v. First Nat. Bank*, 20 Bradw. (Ill.) 611.

⁴ *Tyler v. Taylor*, 8 Barb. (N. Y.) 585.

⁵ *Durfee v. Grinnell*, 69 Ill. 371.

action for a conversion of the goods.¹ It is the same as if one mortgage had been made to the several mortgagees to secure each his separate debt.

If, however, one of two mortgages of the same property be executed and recorded after the other, though on the same day, the mortgagees are neither joint tenants nor tenants in common, but their interests are distinct, and for injuries to such interests each must sue in his own name.²

51. The authority of the president and general manager of a corporation to execute a mortgage of its personal property need not be given by a formal vote. Such an act, with the knowledge of all the members of the board of directors, except one who is absent from the country, and with the concurrence, at the time, of those who remain, or their long continued acquiescence afterwards, may properly be regarded as the act of the corporation.³ A mortgage made by the directors, at a meeting held without the notice required by a by-law of the company, is not for that reason invalid.⁴

An instrument purporting throughout to be a mortgage by a corporation of personal property is not invalid because signed by the president only with his own name and title, and sealed with his individual seal. The seal may be disregarded, because it is not necessary to the validity of such a mortgage; and disregarding the seal the contract will operate as it was clearly intended to operate.⁵

The seal of a corporation to a mortgage purporting to be executed in its name, is *prima facie* evidence of its incorporation and of the due execution of the mortgage.⁶

Under a statute requiring that the written assent of stockholders owning at least two thirds of the capital stock of a corporation shall first be filed in the office of the clerk of the county, in

¹ Howard v. Chase, 104 Mass. 249; Hubby v. Hubby, 5 Cush. (Mass.) 516; Burnett v. Pratt, 22 Pick. (Mass.) 556; Welch v. Sackett, 12 Wis. 243.

² Newman v. Tymeson, 13 Wis. 172.

³ Sherman v. Fitch, 98 Mass. 59. And see Lester v. Webb, 1 Allen (Mass.), 34; Emerson v. Providence Hat Manufacturing Co. 12 Mass. 237; Nelson v. Drake, 14 Hun (N. Y.), 465; Eureka Iron & Steel

Works v. Bresnahan, 60 Mich. 332. For a case where the president and secretary of a corporation were regarded as acting under insufficient authority in executing a mortgage, see Doyle v. Mizner, 40 Mich. 160; S. C. 3 N. W. Rep. 968, 973.

⁴ Samuel v. Holladay, 1 Woolw. 400.

⁵ Sherman v. Fitch, 98 Mass. 59.

⁶ Reed v. Bradley, 17 Ill. 321; Hamilton v. McLaughlin, 145 Mass. 20.

order to make a valid mortgage of its property, the execution of a chattel mortgage by the president and secretary, who were at the time owners of two thirds of the stock, renders the filing of a separate written assent unnecessary.¹

In the absence of any statutory limitation upon the power of a corporation to mortgage its personal property, this power is incident to its existence.² The charter of a corporation granting it "all the powers incident and useful to corporations" includes the power to make a chattel mortgage.³

52. An agent constituted such by parol may execute a valid mortgage of his principal's personal property, it not being necessary that such a mortgage should be executed under seal.⁴ Therefore, an instrument under seal, executed by one acting as agent of a corporation, purporting to mortgage real and personal estate of the corporation, although it be not a lawful conveyance of the real estate, for want of authority in the agent to execute a deed, may nevertheless avail as an unsealed instrument, mortgaging the personal property, if the corporation has given authority to make such a mortgage, or has subsequently ratified it in a manner sufficient for that purpose; and the fact that the money received upon such mortgage went to the use of the corporation, and was retained by it, is evidence of a ratification of the mortgage.⁵

But authority conferred upon an agent to sell property does not authorize him to mortgage it; and a mortgage executed by an agent in his own name, having such authority only, is void.⁶

¹ *Amerman v. Wiles*, 24 N. J. Eq. 13.

² *Jones on Railroad Securities*, § 5; *Moran v. Strauss*, 6 Ben. 249. The power of corporations to mortgage their property is in some states limited by statute. Under the statute of New York, Laws 1864, ch. 517, § 2, as amended by Laws 1871, ch. 481, authorizing a manufacturing corporation, upon written consent of stockholders owning two thirds of its capital stock, to mortgage its real and personal estate to secure the payment of any debt contracted by it in the business for which it was incorporated, it is not essential to the validity of the mortgage that it should

have been given to secure an antecedent debt, but it may secure a debt contracted simultaneously with the giving of the security. *Lord v. Yonkers Fuel Gas Co.* 99 N. Y. 547.

³ *Badger v. Batavia Paper Manuf. Co.* 70 Ill. 302.

⁴ *Despatch Line of Packets v. Bellamy Manuf. Co.* 12 N. H. 205; *Cook v. Harrison*, 19 Bradw. (Ill.) 402. See *Jones on Mortgages*, § 129.

⁵ *Despatch Line of Packets v. Bellamy Manufacturing Co. supra.*

⁶ *Switzer v. Wilvers*, 24 Kans. 384.

Doubtless the principal would effectually ratify such a mortgage by demanding and receiving the proceeds of it.

An absolute bill of sale made by an agent who was only authorized to execute a mortgage is not binding upon the principal, and if disaffirmed by him, it will be construed in favor of the purchaser, as a mere security for so much of the purchase money as was applied to the use of the principal.¹

A mortgage may be made to an agent to secure a debt due his principal, and the agent may enforce the mortgage in his own name for the benefit of the principal.²

The act of an agent, in taking a mortgage in behalf of his principal, is ratified by the latter's bringing suit to recover the value of the goods mortgaged, although the agent had no authority to take the mortgage.³

III. *Description of the Property.*

53. It is not necessary that the property should be so described as to be capable of being identified by the written recital, or by the name used to designate it in the mortgage.⁴ Parol evidence is admissible to show that a particular article is included within the general words of a description. Thus, under a mortgage of all the stock, tools, and property belonging to the mortgagor in and about a wheelwright's shop occupied by him, parol evidence is admissible to show what articles were in and about the shop when the mortgage was made.⁵ It is obviously impossible in most cases to set forth on the face of the mortgage all the articles embraced in it with such precision that any one, by a mere inspection of the mortgage, without reference to any other source of information, can identify them. Resort must generally be had to parol evidence to identify the property mortgaged, although it be enumerated and described with the utmost minuteness. Such evidence is no more requisite to identify property described as all one's household furniture, than it is when the number of chairs, tables, and other articles is given. "Apparently it seems a more bald description, to say 'All my household furniture,' than to enumerate the articles, and describe them as 'two

¹ Coppage v. Barnett, 34 Miss. 621.

² Varney v. Hawes, 68 Me. 442.

³ Partridge v. White, 59 Me. 564.

⁴ Comins v. Newton, 10 Allen (Mass.), 518; Gurley v. Davis, 39 Ark. 394; State v. Cabanne, 14 Mo. App. 294.

⁵ Harding v. Coburn, 12 Met. (Mass.)

333. And see Winslow v. Merchants'

Ins. Co. 4 Met. (Mass.) 306; Willey v.

Snyder, 34 Mich. 60; Goff v. Pope, 83 N. C. 123.

dozen of chairs, five tables,' etc.; but in reality the latter will require extrinsic evidence to identify the property as much as the former would. Or take the case of a mortgage of live stock on a farm; the general description would be, 'All my stock on my farm.' The particulars are, 'Ten cows, two yoke of oxen,' etc.; but in both you must rely upon other sources than the mortgage for the identity of the property mortgaged."¹ A mortgage of a certain number of horses in the mortgagor's possession requires evidence *dehors* the instrument to identify the property; but such evidence would be equally necessary, had the horses been more particularly described, as for instance had they been described as long-tailed gray horses.²

A description may be sufficient between the immediate parties to the mortgage, which would not be sufficient as against creditors of the mortgagor or purchasers from him.³ Generally, however, in treating of the sufficiency of descriptions in mortgages, it is their sufficiency as regards third persons who have in good faith acquired rights against the property that is referred to.

54. The description need not be such as would enable a stranger to select the property. A description which will enable third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient.⁴ "If a stranger is to be sent out to select property mortgaged, with no other means of identification than such as are afforded by the written description, and without being at liberty to supplement that information by such as can be gained in the mortgagor's neighborhood by inquiry of those who know what property the mortgagor

¹ *Harding v. Coburn*, 12 Met. (Mass.) 333, per Dewey, J.

² *Eddy v. Caldwell*, 7 Minn. 225.

³ *Call v. Gray*, 37 N. H. 428; *Leighton v. Stuart*, 19 Neb. 546.

⁴ *Iowa*: *Rhutael v. Stephens*, 68 Iowa, 627; *Winter v. Landphere*, 42 Iowa, 471, per Beck, J.; *Smith v. McLean*, 24 Iowa, 322; *Yant v. Harvey*, 55 Iowa, 421; 7 N. W. Rep. 675; *Kenyon v. Tramel*, 71 Iowa, 693. *Nebraska*: *Jordan v. Hamilton Co. Bank*, 11 Neb. 499; *Price v. McComas*, 31 N. W. Rep. 511; *Wiley v. Shars*, 33 N. W. Rep. 418. *Alabama*:

Tompkins v. Henderson, 3 So. Rep. 774; *Connally v. Spragins*, 66 Ala. 258. *Ohio*: *Lawrence v. Evarts*, 7 Ohio St. 194. *Indiana*: *Tindall v. Wasson*, 74 Ind. 495. *Arkansas*: *Gurley v. Davis*, 39 Ark. 394. *Minnesota*: *Tolbert v. Horton*, 31 Minn. 518; 18 N. W. Rep. 647; *S. C.* 33 Minn. 104; 22 N. W. Rep. 126. *Kansas*: *Griffiths v. Wheeler*, 31 Kans. 17; 2 Pac. Rep. 842. *Missouri*: *Stonebraker v. Ford*, 81 Mo. 532; *State v. Cabanne*, 14 Mo. App. 294. *Maine*: *Elder v. Miller*, 60 Me. 118; *Chapin v. Cram*, 40 Me. 561; *Bank v. Farrar*, 46 Me. 293.

was possessed of which would answer the description in the instrument when it was given, and by possessing himself of such other circumstances as persons usually avail themselves of in applying written descriptions to the things intended, it is much to be feared that the stranger would be so often at fault that chattel mortgages, if their validity depended upon his success in identifying the property, would seldom be of much value as securities. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time. They are not prepared for strangers, but for those they are to affect, — the parties and their privies. A subsequent purchaser or mortgagee is supposed to acquire a knowledge of all the facts so far as may be needful to his protection, and he purchases in view of that knowledge. If he purchases a bull known in the neighborhood by a particular name, he is chargeable with notice of that fact. A mortgage of a bull by that name, if duly filed, would be as good against him as against the man who gave it. It would be a singular defence to be set up by him to the mortgage, that, being a stranger, he discovered no such name on or about the bull, and therefore could not in fairness be bound by a mortgage which undertook to identify the animal by the name. Descriptions do not identify of themselves; they only furnish the means of identification. They give us certain marks or characteristics, — perhaps historical data or incidents, — by the aid of which we may single out the thing identified from all others; not by the description alone, but by that explained and applied. Even lands are not identified by description until we place ourselves in the position of the parties by whom the description has been prepared, and read it with the knowledge of the subject matter which they had at the time.”¹

A mortgage which describes the property as “one bay horse, aged six years,” in the mortgagor’s possession in a certain county, is not void by reason of insufficiency of description, though the description would not enable a third person, without the aid of facts not contained in the mortgage, to identify the horse. But the description would enable a third person, aided by inquiries which the instrument itself suggests, to identify the property, and is therefore sufficient.² A mortgage of “fifty head of steers about

¹ Willey v. Snyder, 34 Mich. 60, per Chief Justice Cooley.

² Mills v. Kansas Lumber Co. 26 Kans. 574. Mr. Justice Valentine, delivering

twenty months old, now owned by me and in my possession on my farm" in a certain township, is sufficient against subsequent purchasers, though some of the cattle were bought in an adjoining township into which the farm extended.¹

54 a. It is important to state the location of the mortgaged property. A description which, without stating the location of the property, would be regarded as too indefinite and uncertain, may be rendered sufficiently definite and certain by making the mortgage itself indicate where the property may be found on inquiry.²

A mortgage of "one span of colts, three years old, one gray, one bay," with no reference to ownership, location, or anything else which would enable third parties by inquiry to identify the property, is invalid for insufficiency of description.³

A mortgage of "one bay horse, seven years old," of a weight named, is sufficient, in connection with a provision that the prop-

the decision of the court, said: "Personal property can seldom be so described in any instrument as to enable a stranger to select it from other property of like kind, without the aid of other facts than those mentioned in the instrument itself. The name of the horse in the present case was 'George,' but there may have been several other horses in the same county by the same name, and a stranger could not tell, without inquiries, what this horse's name was, or whether it was one of the horses whose name was George, or not. Resort must be had in nearly all cases to other evidence than that furnished by the mortgage itself, to enable third persons to identify mortgaged property; and generally where there is a description of the property mortgaged, and the description is true, and by the aid of such description, and the surrounding circumstances, the third person would, in the ordinary course of things, know the property that was mortgaged, the description should be held to be sufficient. In the present case, the attaching officer was bound to take notice of the mortgage, for it had been properly recorded. He was bound to know that a bay horse, six years old in 1878, owned by and in the possession of the

mortgagor, was mortgaged. We think he was bound to know from the mortgage itself, that the property was situated in McPherson County on November 2, 1878, when the mortgage was executed; and by inquiry he could have ascertained that this was the only bay horse which the mortgagor either owned or possessed, and that he owned and possessed the same in McPherson County, and he knew, when he attached this property, that he attached it in McPherson County, and as the property of the mortgagor, and that it was mortgaged. Under such circumstances, we think, as between the mortgagee and the attaching officer, we must hold that the description was and is sufficient."

¹ Kenyon v. Tramel, 71 Iowa, 693; 28 N. W. Rep. 37.

² Adams v. Ryan, 61 Iowa, 733; Adams v. Commercial Nat. Bank, 53 Iowa, 491; Pennington v. Jones, 57 Iowa, 37; Muir v. Blake, Ib. 662; Eggert v. White, 59 Iowa, 464; Muncie Nat. Bank v. Brown (Ind.), 14 N. E. Rep. 358.

³ Rhutasel v. Stephens, 68 Iowa, 627. And see Caldwell v. Trowbridge, 68 Iowa, 150; Warner v. Wilson (Iowa), 36 N. W. Rep. 719; Schmidt v. Bender (Kans.), 18 Pac. Rep. 491.

erty is to remain in the hands of the mortgagor, to impart notice by the record of it.¹

Where a mortgage was made of "one bay horse named Billy, ten years old last spring, and one one-seated buggy, and one set of single harness, all of which is in my possession, and clear of incumbrance," and the mortgage showed that the mortgagor resided in a particular county, and provided that, if any attempt to remove the property from that county should be made, the mortgagee might take possession, the description was held sufficient.²

A mortgage of "a flock of six hundred head of sheep, consisting of wethers, ewes, and lambs, and their increase for the year 1882," owned by the mortgagor in a county named, sufficiently describes the property.³

Where the description was, twenty-three head of horses and mules, all situated on the mortgagors' range on the South Loup River, the above described chattels being now in their possession, and owned by them, and the testimony showed that the range in question was situated in the county where the mortgage was filed for record, and that the horses and mules were all those possessed by the mortgagors, it was held a sufficient description.⁴

55. But the mortgage, to be effectual as against third persons, must point out the subject-matter of it, so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property covered.⁵ As between the parties to the mortgage, a specific and particular description is not necessary, and the articles intended to be mortgaged may be shown by parol evidence. But as against creditors of the mortgagor, and others who may acquire any adverse rights, the mortgage is not effectual unless it affords some means of identifying the property. A description which is sufficient between the parties may be insufficient as against third persons.⁶ In treating of the sufficiency of descriptions contained in mortgages, their

¹ *Wheeler v. Becker*, 68 Iowa, 723. And see *Peters v. Parsons*, 18 Neb. 191.

² *Brock v. Barr*, 70 Iowa, 399; 30 N. W. Rep. 652. And see *Wells v. Wilcox*, 68 Iowa, 708.

³ *Corbin v. Kincaid*, 33 Kans. 649.

⁴ *Wiley v. Shars*, 22 Neb. 712; 33 N. W. 418.

⁵ Quoted with approval in *Tindall v.*

Wasson, 74 Ind. 495, 500, and *Cass v. Gunnison*, 58 Mich. 108, 115. See, also, *Tootle v. Lyster*, 26 Kans. 589; *Eggert v. White* (Iowa, 1882), 13 N. W. Rep. 426; *Wiley v. Snyder*, 34 Mich. 60.

⁶ *Gurley v. Davis*, 39 Ark. 394; *Dodds v. Neel*, 41 Ark. 70, 73; *Cass v. Gunnison*, 58 Mich. 108.

sufficiency as against third persons is referred to, unless their sufficiency as between the parties is expressly designated.

Property which is in no manner described, and in regard to which the instrument in no way indicates any inquiries, is not affected by the mortgage. Thus, the mortgage of a cow, containing no reference to her increase, will not defeat a sale of her calf by the mortgagor in possession, after the time has passed when it is necessary for the calf to follow its dam for its nurture.¹

A description of a mare as having four white legs, when in fact she had but one foot white to the pastern joint, with a little white on another foot, is not sufficient to make the recording of the mortgage constructive notice; for the description in this part is essentially different from the mare in controversy, and tends to prove that the mare described is not the one claimed. Therefore, in such case, unless the mortgagee can show by evidence *aliunde* that the mare in controversy is the one mortgaged, together with such facts and circumstances as would tend to show the ability of the adverse claimant, aided by inquiries which the mortgage itself indicated, to identify the mare, he will fail in his claim.² And so a mortgage of "two mule colts one year old next spring," in the absence of parol evidence to identify the property, contains no sufficient description, and is therefore invalid.³

¹ Winter v. Landphere, 42 Iowa, 471.

² Rowley v. Bartholomew, 37 Iowa, 374. And see Smith v. McLean, 24 Iowa, 322.

³ Tindall v. Wasson, 74 Ind. 495. Reference is made in this case to Duke v. Strickland, 43 Ind. 494, which expressly overrules McCord v. Cooper, 39 Ind. 9, the court declaring that there is no real conflict between the two cases, for in the former there were circumstances of identification which were altogether wanting in the latter. See §§ 64 and 69, where these cases are cited.

In Tindall v. Wasson, *supra*, Elliott, J., upon a petition for a rehearing, said: "The infirmity in the description exhibited by the answer is, that it does not supply any circumstances of situation, of place, or indeed circumstances of any character, to afford information or suggest inquiry. Returning to the case of Burns v. Harris, 66 Ind. 536, we find that the

judge who delivered the opinion of the court said, 'In the case at bar there is no room for doubt on the evidence, as to the identity of the mare mortgaged to the appellee with the mare in the possession of the appellants, and in controversy in this action.' The question in dispute was as to the color of the mare, — whether she was a dark bay mare, or a dark brown mare. It was also said, 'A chattel mortgage, wherein the mortgaged chattel is described as a dark bay mare, is not void for uncertainty in the description of the chattel.' As applied to the question presented upon the evidence, with all the circumstances of ownership and location before the court, the statement was entirely correct. But the case in which that language was used, and the facts to which it was intended to apply, are widely different from the case we have in hand. Here there is, as is expressly conceded, not a solitary circumstance to aid the description,

A mortgage by country traders of "our entire stock of dry goods, boots, shoes, hats, clothing, and notions, and such other goods as are usually kept in a first-class country store," without any sort of designation of the whereabouts of the goods, or any other language of identification, is not a sufficient description.¹

A mortgage of a stock of goods, in general terms, executed by one living in Kansas to his creditor living in Missouri, which did not show in what town or county or state the property was situated, or where the mortgage was executed, nor correctly in whose possession the property was when it was executed, though it was made subject to a prior mortgage of the same property which was described by date and the names of the parties, but not by its record, was held void as against a third person claiming an interest in the property, for uncertainty in description.²

A mortgage of all the crops to be raised by the mortgagor in a certain county for the term of three years, is too indefinite and uncertain to charge third persons with notice. The description is a roving one, with nothing in the way of identification to suggest inquiry where in the county the crops may be found. A crop might be in one place in the county for one year in the three, and in another place for another year, or there might be crops in different parts of the county for the same year. "A chattel mortgage ought not to be a drag-net covering a whole county in any such general terms."³ A mortgage of ten acres of

which in itself is about as vague and indefinite as a description could very well be. If there had been — as doubtless there might have been had counsel pursued the usual course — evidence offered in aid of the description, it might have been made sufficient. Without some such aid, the description is so indefinite as to supply no grounds of identifying the mortgaged property, for, taken alone, it would apply to any 'mule colts one year old' in the spring of 1871."

¹ *Jaffrey v. Brown*, 29 Fed. Rep. 476. The following descriptions of property are not so uncertain as to invalidate the mortgages, the property described being all of that kind owned by the mortgagor: "Forty-one Berkshire hogs and sixty-five grain-sacks." *Knapp, &c. Co. v. Deitz*, 64 Wis. 31; 24 N. W. Rep. 471. "One

horse." *Spivey v. Grant*, 96 N. C. 214; *Sharpe v. Pearce*, 74 N. C. 600. "Sixty head of two and three year old steers." *Caldwell v. Trowbridge*, 68 Iowa, 150; 26 N. W. Rep. 49. "Sixty head of hogs." *Everett v. Brown*, 64 Iowa, 420. "One horse mule." *Stewart v. Jaques* (Ga.), 3 S. E. Rep. 283. "Forty fat hogs." *Everett v. Brown* (Iowa), 20 N. W. Rep. 743. "All the cut and growing and having grown" on land described, the words *crops, grass*, or the like, being omitted. *Cray v. Currier*, 62 Iowa, 535. A mortgage of an open buggy, made by makers named, and bought of them, is insufficient to impart notice to third persons. *Ormsby v. Nolan*, 69 Iowa, 130.

² *Tootle v. Lyster*, 26 Kans. 589.

³ *Muir v. Blake*, 57 Iowa, 662, 665. But see § 611. Such a description, how-

cotton to be grown, without further specification, is for the same reason void for uncertainty as against third persons.¹

55 a. In describing a crop to be raised, it is essential to state when it is to be raised as well as where it is to be raised; and generally a description which omits the year, and does not in any way indicate the time within which the crop is to be raised, is insufficient as against a third person acquiring rights in it.²

But the time of raising the crops may be sufficiently indicated without naming the year. Thus a mortgage of "crops growing and to be grown" on certain land is sufficiently definite to cover crops growing at the time of its execution.³

A mortgage of "thirty-five acres of winter wheat" growing on land described, sufficiently describes the property.⁴

A mortgage of a bale of good middling cotton, which the mortgagor may make during the year, is void because it neither designates the place where it is to be raised, nor identifies the bale of cotton so that it can be separated from other cotton raised by the mortgagor.⁵

A mortgage of "all the grain, wheat, flax, and corn raised" on certain land, without stating the year when it was to be raised, is insufficient to impart notice to creditors of the mortgagor.⁶

56. A mortgage of a specified number of articles out of a larger number is void for uncertainty, when the particular articles intended to be conveyed are not separated, or designated in any way so that they can be separated from others of the same kind.⁷ In a deed of trust by several grantors, a description of a wagon as "one four horse iron-axle wagon," without any desig-

ever, seems to be sufficient in Alabama. *Hamilton v. Maas*, 77 Ala. 283.

¹ *Krone v. Phelps*, 43 Ark. 350.

² *Eggert v. White*, 59 Iowa, 464; *Pennington v. Jones*, 57 Iowa, 37; 10 N. W. Rep. 274; *Cole v. Kerr*, 19 Neb. 553.

³ *Luce v. Moorehead* (Iowa), 35 N. W. Rep. 598; *Kimball v. Sattley*, 55 Vt. 284.

⁴ *Muse v. Lehman*, 30 Kans. 514. And see *Sims v. Mead*, 29 Kans. 124.

⁵ *Atkinson v. Graves*, 91 N. C. 99.

⁶ *Barr v. Cannon*, 69 Iowa, 20.

⁷ *Croswell v. Allis*, 25 Conn. 301. And see *Bullock v. Williams*, 16 Pick. (Mass.) 33, per Shaw, C. J.; *Kelly v. Reid*, 57 Miss. 89; *Draper v. Perkins*, 57 Miss. 277; *Newell v. Warner*, 44 Barb. (N. Y.) 258, 263; *Fowler v. Hunt*, 48 Wis. 345; *S. C. 4 N. W. Rep.* 481; *Person v. Wright*, 35 Ark. 169; *Washington v. Love*, 34 Ark. 93; *Spivey v. Grant*, 96 N. C. 214; *Souder v. Voorhees*, 12 Pac. Rep. 526; 36 Kans. 138; *Clark v. Voorhees*, 36 Kans. 144; 12 Pac. Rep. 529; *Stonebraker v. Ford*, 81 Mo. 532.

nation of ownership, or location, or other description, is insufficient.¹ But a description of horses and mules, by color, sex, and name, is good.²

A description of a certain number of feet of logs, board measure, situated in a stream, and not designated in any way to distinguish the mortgaged logs, by fixing their location or otherwise, from a very large mass of logs bearing the same mark, is insufficient. Thus, a mortgage of "one hundred thousand feet of white pine saw logs, now on the North Branch, so called, of Thunder Bay River," without further description or identification to distinguish or separate them from a very much larger mass of logs belonging to the mortgagor in the same river, is void for uncertainty.³ "As well might we undertake," say the court, through Marston, J., "to enforce a chattel mortgage given upon a pile of lumber in a certain yard containing fifty or a hundred piles, or given upon twenty sheep in a flock of one hundred, or upon ten head of cattle in a drove or herd of fifty. To sustain such mortgages would, I think, enable parties to commit gross frauds, and would also tend to prevent third parties from afterwards purchasing or acquiring interests in the property, a part of which had been thus mortgaged, and thus tend to discourage trade."

A mortgage by a carriage maker of "ten new buggies," without delivery of possession, and without any further description to distinguish the mortgaged property from a lot of fifteen buggies of the same kind, then owned by the mortgagor, is ineffectual to pass title to the property, or to enable the mortgagee to recover possession of the same. Such a mortgage does not constitute the mortgagee a tenant in common with the mortgagor in the lot of fifteen new buggies.⁴ A mortgage of "one hundred and twenty-four head of mules, now in the Territory of Kansas," and "one pair of clay-bank horses," without further description, was held void for uncertainty, upon the ground that it did not distinguish the property intended to be mortgaged from other similar property, or enable third persons by inquiry to identify it.⁵ But the

¹ *Nicholson v. Karpe*, 58 Miss. 34.

² *Nicholson v. Karpe*, *supra*.

³ *Richardson v. Alpena Lumber Co.* 40 Mich. 203; *S. C.* 8 Cent. L. J. 297. And see *Cass v. Gunnison*, 58 Mich. 108; *Stonebraker v. Ford*, 81 Mo. 532.

⁴ *Blakely v. Patrick*, 67 N. C. 40. See also *Spivey v. Grant*, 96 N. C. 214; 2 S. E. Rep. 45; *Byrd v. Forbes* (W. T.), 13 Pac. Rep. 715.

⁵ *Golden v. Cockril*, 1 Kans. 259. And see *Montgomery v. Wight*, 8 Mich. 143;

same court, professing to keep within the rule of this decision, held that a mortgage of a certain number of cattle described as in the possession of the mortgagor, in a county named, was not void for uncertainty.¹ "It is not to be presumed, in a case of doubt, that the parties deliberately made an instrument which was of no legal value whatever; on the other hand, the presumption must be indulged, unless the contrary appears from the language employed, that the parties meant to make a legal and binding contract."²

A mortgage of so much of a growing crop of cotton as will make two bales, each weighing not less than five hundred pounds, the same to be gathered, prepared for market, and delivered by the mortgagor by a certain date, passes no title to any of the cotton as against a judgment creditor of the mortgagor who levies an execution before the date specified on seed cotton, part of such crop; and the mere intention of the mortgagor, not communi-

Parsons Savings Bank v. Sargent, 20 Kans. 576; *Kelly v. Reid*, 57 Miss. 89; *Souders v. Voorhees*, 36 Kans. 138; 12 Pac. Rep. 526; *Clark v. Voorhees*, 36 Kans. 144; 12 Pac. Rep. 529.

A description of the property mortgaged as "nine head of two and three year old steers situate on farm south of Bennett, Neb., one and one fourth miles," where the mortgagor owned a herd of 90 steers, was held insufficient to enable a third person, aided by the inquiries which the instrument suggests, to identify the property. The further fact that the mortgagee has separated the cattle alleged by him to be mortgaged, will not render the description sufficient. *Price v. McComas*, 21 Neb. 195; 31 N. W. Rep. 511.

A mortgage of "eleven Smith farm wagons," the mortgagor having just this number at the time, is sufficiently definite as against the mortgagor and any adverse claimants having actual notice of the transaction, and parol evidence is admissible to show that the wagons in question are those that the mortgagor had. *Clapp v. Trobridge* (Iowa), 38 N. W. Rep. 411; and see *Cummings v. Tovey*, 39 Iowa, 195; *Wiley v. Shars* (Neb.), 33 N. W. Rep. 418.

A mortgage of one hundred and eighty head of merino and Cotswold sheep in a certain county, owned and possessed by the mortgagor, he having only just that number of such sheep, is not void for an insufficient description of the property. *Crisfield v. Neal*, 36 Kans. 278; 13 Pac. Rep. 272.

A mortgage of "forty head of cattle of different ages and sexes, most of them thoroughbreds," on a certain farm, is insufficient, if it is shown that the mortgagor had forty-five or forty-six head of cattle on such farm. *Stonebraker v. Ford*, 81 Mo. 532.

A chattel mortgage of a certain number of bushels of grain out of a larger quantity, which is not uniform in quality and value, the whole of which is in the possession of the mortgagor, the description giving no clue by which the part intended to be mortgaged can be distinguished by third parties from the remainder, is void for uncertainty. *Clark v. Voorhees*, *supra*. And see *Souders v. Voorhees*, *supra*.

¹ *Brown v. Holmes*, 13 Kans. 482; *Shaffer v. Pickrell*, 22 Kans. 619.

² *Draper v. Perkins*, 57 Miss. 277, per George, C. J.

cated to the mortgagee or to the creditor before the levy, to gin, bale, and deliver the particular cotton to the mortgagee, will not avail to fasten the mortgage lien upon that part of the crop.¹ The mortgagee has no right in such case to select any particular part of the cotton to the extent of two bales, and assert title thereto as against the mortgagor's creditors. If he could do so as to the seed cotton levied on, he could equally select his two bales from a part of the crop previously sold.²

But, as between the parties to it, such a mortgage has been sustained on the ground that it gives the mortgagee the right to select the number of articles mortgaged from the whole number belonging to the mortgagor. Thus, if a mortgage specify a certain number of articles of furniture in a house in which there are other like articles belonging to the mortgagor, the mortgagee may select from the whole enough to satisfy the terms of his mortgage.³

57. An exception of such articles included in the description as are exempt from attachment, or from levy and sale under execution, may make the mortgage wholly void for uncertainty. In a case where a mortgage of household furniture contained such a clause, the court well said:⁴ "The articles attempted to be sold by the mortgage are all articles capable of being identified and distinguished by their physical attributes or characteristics. But how many, and which of them, became the

¹ *Williamson v. Steele*, 3 Lea (Tenn.), 527; and see *Person v. Wright*, 35 Ark. 169; *Washington v. Love*, 34 Ark. 93; *Dodds v. Neel*, 41 Ark. 70.

² In *Williamson v. Steele*, *supra*, Cooper, J., said: "His right would be ambulatory to suit his convenience or his caprice. The selection is left to the grantors, by whom the prescribed quantity is to be 'gathered, prepared for market, and delivered.' It is the fact that no title passed, or could possibly pass, to any of the cotton until designated by the selection of the grantors. The contract embodied in the instrument was legal, and a selection and setting apart of the property for the grantee by the grantors, before levy, would have perfected the grantee's right in equity. The intention of the grantors to have the seed cotton, which was levied

on, ginned, and made into bales, and delivered, cannot supply the place of the act. The will is not equivalent to the deed, where the rights of third persons are concerned."

³ *Call v. Gray*, 37 N. H. 428. In *Heyward's case*, 2 Coke, 36, it is said: "If I give you one of my horses in my stable, then you shall have election, for you shall be the first agent by taking or seizure of one of them. And if one grant to another twenty loads of hazel or twenty loads of maple, to be taken in his wood of D., then the grantor shall have election, for he ought to do the first act, *i. e.* to cut and take it." And see *Gurley v. Davis*, 39 Ark. 394.

⁴ *Newell v. Warner*, 44 Barb. (N. Y.) 258, per Johnson, J.

property of the plaintiff upon the execution and delivery of the mortgage? The instrument does not profess to convey all, but a part only. Which part does it transfer, and which reserve? In respect to the common articles of household furniture, it would be exceedingly difficult, and it seems to me utterly impossible, for any one to designate which passed to the plaintiff, and which were reserved to the mortgagor. The mortgage does not specify nor furnish any means of selection, and the statute of exemption affords no criterion by which they could be distinguished. There has been no delivery by the mortgagors, and nothing whatever done by either party to the mortgage, by way of separation or identification, of what was mortgaged or intended to be, and what was reserved from the sale."

For the same reasons a mortgage of a stock in trade and fixtures, consisting of clocks, watches, chains, show-cases, jewelry, and the like, excepting certain enumerated articles, and stock in trade to the amount of two hundred dollars, is void for uncertainty.¹ This exception leaves in the mortgagor an interest in each article mortgaged, proportionate as the value excepted is to the whole value of the property. This interest is uncertain and unsevered, and moreover is inseverable and incomputable, except by some future act of the parties; or the instrument leaves to the mortgagor a right of future selection of any of the property of the value of two hundred dollars, the residue of which can be ascertained only by such selection; and in either view such uncertainty of description renders the mortgage void.²

58. But an exception of property exempt from execution will not apply to articles specifically described, when there is property included in a general description to which it may apply. Thus a description, after enumerating certain articles of household furniture, specifically added also, "other personal property in and about said house and premises," excepting therefrom such personal property as is exempt from execution by the laws of the state; "also excepting household goods, furniture, and utensils therein, of the value of two hundred and fifty dollars." The mortgagor had at the time in his house two hundred and fifty dollars' worth of goods, furniture, and utensils, besides the enumer-

¹ Fowler v. Hunt, 48 Wis. 345; S. C. 4 N. W. Rep. 481.

² Fowler v. Hunt, *supra*, per Orton, J.

ated articles and those exempt from execution. Construing the mortgage in the light of these facts, the Supreme Court of Michigan held that the exemption applied to the property described generally, and that the specific articles were mortgaged unconditionally.¹

59. But a mortgage of a specified number of articles is valid, if it provides a way of separating them from a mass of like property; but otherwise it is not valid.² Thus a description of logs as the northerly 1,250,000 feet, lying in a certain creek, and marked with a certain mark, to be ascertained by commencing at the rear or northerly end of said logs, and counting along the stream until the requisite number should be counted and set apart, is sufficiently definite. A creditor of the mortgagor having seized the logs on execution, the mortgagee was allowed to recover them, because the mortgage described them with certainty enough to enable creditors of the mortgagor to distinguish the property intended to be mortgaged and to identify it.³ It is not necessary to measure or separate the logs by a boom, or other artificial boundary, in order to make the mortgage valid; nor is it necessary to measure the logs before the mortgage could take effect. A surveyor, or other person skilled in measuring logs, could ascertain accurately the specific logs mortgaged; and this is all that is required to make the mortgage sufficiently definite and certain.

An agreement to pay a debt "out of the first cotton that may be gathered" is sufficiently definite and specific in the description of the property mortgaged.⁴

And so a mortgage of a specified number of articles described as being in a certain building is valid, when it turns out that there is in the building a less number of such articles than the mortgage calls for. The mortgage will pass all the articles answering the description contained in the building, and beyond that it will be inoperative.⁵

¹ *Giddey v. Uhl*, 27 Mich. 94.

² *Dodds v. Neel*, 41 Ark. 70:

³ *Merchants' National Bank v. McLaughlin*, 1 McCrary, 258; *S. C. 2 Federal Reporter*, 128.

⁴ *Stearns v. Gafford*, 56 Ala. 544; *Robinson v. Mauldin*, 11 Ala. 977.

⁵ *Croswell v. Allis*, 25 Conn. 301; *Kelly*

v. Reid, 57 Miss. 89. The proper mode of describing property such as a stock of cattle, horses, and mules, where it is intended to convey all the property of that kind owned by the mortgagor, would be to say, "All my stock of cattle, consisting of about thirty head, and all my horses and mules, consisting of two head of the

A mortgage of three bales of middling cotton, which the mortgagor may raise the present year on a certain plantation or elsewhere, is admissible in evidence. But if it should appear that the mortgagor raised more than three bales on that plantation, and that no particular three bales had been set apart by him and accepted by the mortgagee before some other lien had attached upon the mortgagor's cotton, the mortgage would doubtless be held void for uncertainty.¹

A mortgage of ten bales of cotton, out of each annual crop to be produced on certain land for six years, is void for uncertainty as against creditors of the mortgagor and others acquiring adverse rights.²

A mortgage of an undivided part of certain personal property, such for instance as a crop of wheat, to be set apart at the time of threshing, will take effect, and pass such portion of the property, when set apart, if it appear that this be the entire interest of the mortgagor in the crop.³

A mortgage of "one third of twenty-two acres of growing wheat," the situation of which is described, means the undivided one third part of such wheat, and is sufficiently definite in description.⁴

60. A defective description may be cured by a subsequent actual delivery of the property to the mortgagee, as against persons who have not acquired any right or interest before such delivery.⁵

Where a mortgagor identifies and delivers to the mortgagee property as being that which was described in the mortgage, and the mortgagee takes full possession thereof by consent of the mortgagor, before the execution of an assignment for the benefit of creditors by the mortgagor, this cures any insufficiency or want of certainty of description so far as the mortgagor and the assignee

former and three head of the latter." If the description be merely so many head of cattle and so many horses and mules, and the mortgagor has in fact a greater number, and no intention is manifested to include the whole, there would be a failure to identify the particular animals conveyed, and the deed would be void. Per George, C. J., in *Kelly v. Reid*, 57 Miss. 89.

¹ *Draper v. Perkins*, 57 Miss. 277.

² *Dodds v. Neel*, 41 Ark. 70.

³ *Potts v. Newell*, 22 Minn. 561.

⁴ *Zehner v. Aultman*, 74 Ind. 24.

⁵ *Parsons Savings Bank v. Sargent*, 20 Kans. 576; *Williamson v. Steele*, 3 Lea (Tenn.), 527, 530, per Cooper, J. See § 178.

are concerned ; the assignee's right in this respect being the same as that of the mortgagor.¹

A provision in the mortgage for a delivery of the property may serve as a means of separating it from other like property, and thus identifying it. Thus, a mortgage of six bales of cotton described as then growing on a certain plantation, such bales to average five hundred pounds each, to be covered with bagging and bound with iron ties, and delivered at a certain warehouse by a specified time, contains a sufficiently specific description of the property. If it be shown that six bales of the crop were delivered according to the terms of the mortgage, this is a sufficient identification of the cotton described in the mortgage.²

A mortgage of crops to be sown or planted, which does not name the year in which they are to be grown, is too indefinite and uncertain to be regarded as valid as against third persons, unless the mortgagee cure the defect by taking possession before any rights attach in favor of third persons. Although the mortgage was executed in February of the year 1879, and the debt secured was to become payable in December of that year, it was declared that an attaching creditor of the mortgagor could just as well conclude that the mortgage covered the crops to be grown in 1880 or 1881 as those in 1879.³

61. A portion of a description which is false or inconsistent with the rest of the description may be rejected, if the remainder of the description is sufficient to pass the property.⁴ Thus, where a mortgage described the property as "all the staves I have in Monterey, the same I had of Moses Fargo," while it appeared in evidence that the mortgagor had no staves in Monterey, but had a quantity in the adjoining town of Sandisfield, near the boundary of Monterey, which he had of Moses Fargo, the first part of the description was rejected as false, the remainder being sufficient to pass the property.⁵

¹ *Frost v. Citizens' Nat. Bank of Beloit*, 68 Wis. 234 ; 32 N. W. 110.

² *Stephens v. Tucker*, 14 N. J. L. 600. And see *Robinson v. Mauldin*, 11 Ala. 977.

³ *Pennington v. Jones*, 57 Iowa, 37. And see *Muir v. Blake*, 57 Iowa, 662, 665 ; *S. C.* 9 N. W. Rep. 345 ; 11 N. W. Rep.

621 ; *Eggert v. White* (Iowa, 1882), 13 N. W. Rep. 426.

⁴ *Dodge v. Potter*, 18 Barb. (N. Y.) 193 ; *Goff v. Pope*, 83 N. C. 123 ; *State v. Cabanne*, 14 Mo. App. 455 ; *S. C.* Ib. 294.

⁵ *Pettis v. Kellog*, 7 Cush. (Mass.) 456.

A misdescription of the location of a part of the mortgaged property does not invalidate the mortgage as to that part of the property, if it can be identified by the aid of parol evidence.¹

If the mortgaged chattel be correctly described, but the lot of ground upon which it is situated be misdescribed, such misdescription may be rejected as surplusage, it being wholly immaterial.² Thus, where a deed of trust was made of "a crop of cotton now being cultivated and raised by the mortgagor upon certain lands upon which he is now living, and rented by him from Newman;" and it appeared that, at the time of the execution of the deed of trust, the grantor resided upon and cultivated land rented from Weatherly, but that he also cultivated land rented from Newman, it was held that the deed of trust only covered the crop on the land rented from Weatherly, upon which the mortgagor was living.³ The words, "and rented from Newman," were rejected as an erroneous addition, according to the maxim, *Falsa demonstratio non nocet*. Parol evidence as to the intention of the parties in such case is inadmissible, because such evidence would be used to supply an omission, or to reject a part of the description which was true.

In a mortgage describing a yoke of oxen as four years old at the date of the mortgage, a mistake in the age of the oxen, when the mortgagor at the time, and afterward, had only one yoke of oxen, does not invalidate the mortgage.⁴ The intention of the parties as to what oxen were to be covered by the mortgage was made perfectly evident by showing that the mortgagor had no other cattle which could by any possibility answer the description.⁵ And so a mortgage of "all the cattle, consisting of two yoke, aged six and seven years, color red, white, and blue, . . . and all other property now in our possession in or about said village," contains a sufficient description; and it does not matter that the description, "red, white, and blue," does not apply to each of the oxen.⁶ A misdescription of the age of horses or cattle mortgaged is not material, if the description is otherwise correct.⁷

¹ Goff v. Pope, 83 N. C. 123.

² Spaulding v. Mozier, 57 Ill. 148; Ad-
amson v. Petersen, 35 Minn. 529.

³ Hunt v. Shackleford, 56 Miss. 397.

⁴ Harris v. Kennedy, 48 Wis. 500; S. C.
21 Albany L. J. 496; 4 N. W. Rep. 651.

And see Rowley v. Bartholomew, 37 Iowa,
374; Lawrence v. Evarts, 7 Ohio St. 194.

⁵ Harris v. Kennedy, *supra*, per Tay-
lor, J.

⁶ Fordyce v. Neal, 40 Mich. 705.

⁷ Tolbert v. Horton, 33 Minn. 104.

62. Property not fairly included in the terms of the description will not pass by the mortgage. The instrument must control unless there be a latent ambiguity, which opens the door for parol evidence to show the intention of the parties. Such evidence is not admissible to show that property not answering the description was intended to be included in the mortgage.¹ There can be no substitution of other property by agreement of the parties, so that others will be bound by the agreement.²

A mortgage of crops "now standing and growing" in a field was held not to include grain which had at the time been cut.³ A mortgage by a merchant of "goods in store" does not include a safe kept in his store, not for sale, but for his private use. What the mortgage covers is a question of intent, and such a description cannot be understood to refer to anything but merchandise kept on hand for sale.⁴ A mortgage of "the goods and chattels now in" the mortgagor's store in a certain town, "a schedule of which is hereunto annexed," covers only the goods then in the store, and included in the schedule.⁵ A mortgage of a stock in trade of a partnership does not cover debts due the firm.⁶ There is an essential distinction between stock and capital,⁷ and stock does not comprehend credits either in the legal or mercantile acceptance of the word.

A mortgage of "groceries" contained in a country and village grocery store does not include pails, shovels, and the like, although such goods are usually kept in such a store. Parol evidence cannot enlarge the description contained in the mortgage so as to bring within its operation articles not fairly included in its terms. Usage cannot make groceries of pails and shovels. Many articles may be usually kept in a country and village grocery store which are not groceries; and the fact that they are so kept does not make them groceries, or extend the natural and accepted meaning of this word so as to include them.⁸

A mortgage of the "fixtures, furniture, and appliances used in and about the carrying on of" a grocery store, does not cover

¹ *Hutton v. Arnett*, 51 Ill. 198.

² *Hunt v. Bullock*, 23 Ill. 320.

³ *Ford v. Sutherlin*, 2 Mon. 440.

⁴ *Curtis v. Phillips*, 5 Mich. 112.

⁵ *Partridge v. White*, 59 Me. 564.

⁶ *Kemp v. Carnley*, 3 Duer (N. Y.), 1.

⁷ *Crawshay v. Collins, J. & W.* 267, 278; 2 Russ. 339, per Lord Eldon.

⁸ *Fletcher v. Powers*, 131 Mass. 333.

wagons and teams used by the mortgagor for the delivery of goods from the store to his customers.¹

A mortgage which describes a horse as "brown," and further describes the animal as being kept on the farm of the mortgagor in a township named, is sufficient, though the color of the horse might be called "black."²

63. A description which is wholly false renders a mortgage ineffectual. If the falsity of it be a mistake, this may be cured by reforming the instrument in equity; but as against others acquiring interests in the property, such reformation is ineffectual after their interests have attached. Thus, if a mortgage of growing crops describe them as being upon land in a certain section, township, and range, and the description is a mistake in the number of the township and range, the mortgage is invalid as against a creditor who levies an execution on the crops which the parties intended to embrace in the mortgage.³ If the property had been described as so many acres of growing wheat and corn now upon the farm of the mortgagor, or in his possession, the identity of the property could have been fixed by reasonable inquiry. But when the description definitely fixed the location of the property, although it called for an impossible township and range, the error was not such as to put a creditor upon inquiry to ascertain if there had been some mistake, or to ascertain to what property, if any, it did apply, so long as it did not apply to the property upon which he levied his execution. The positive and definite description should be allowed to prevail.

A description which is partially untrue does not render the mortgage void, if the part which is correct does not apply to other like property, and reasonably identifies the property in controversy.⁴

¹ *Van Patten v. Leonard*, 55 Iowa, 520. "The question is of intent. We cannot believe that either of the parties to this instrument intended by the word 'appliances' to include horses, harnesses, and wagons. It is only by an extended and, perhaps, somewhat forced construction, that it can be made to include such property. The word ought not to be extended beyond its usual and ordinary meaning."

² *Yant v. Harvey*, 55 Iowa, 421; and

see *Harris v. Woodard*, 96 N. C. 232; *Hall v. Younts*, 87 N. C. 285, 291; *Tompkins v. Henderson* (Ala.), 3 So. Rep. 774.

³ *Adams v. Commercial Nat. Bank*, 53 Iowa, 491; *S. C. 5 N. W. Rep.* 619.

⁴ *Tolbert v. Horton*, 33 Minn. 104; *King v. Aultman*, 24 Kans. 246. The mortgage in this case was "one bay mare, one hind foot white, and white spot in face, branded G, seventeen hands high, five years old," and being in the possession

A description of a mule as a "light bay," when in fact it was light gray, has been held to be a fatal misdescription as against a purchaser without notice.¹

64. Parol evidence is admissible to identify the chattels mortgaged.² Such evidence may aid but not make a description.³ The mortgage must of itself suggest inquiry which will result in identification.⁴ It is not possible to describe personal property so well as to preclude the necessity of such evidence to identify it. Thus, if a mortgage be made of a pile of wood upon a certain lot of land, upon which there are also other piles of wood, resort may be had to extrinsic proof to determine which pile was intended.⁵

With the aid of evidence *aliunde* to identify the property, the following descriptions in mortgages have been held sufficient: fourteen mules, now on the mortgagor's plantation in a certain county;⁶ one black mule about eight years old;⁷ two horses be-

of the mortgagors, in Clay County, Kansas. This description was correct in every particular, except that the brand was J (though very indistinct and scarcely discernible), and the mare was not seventeen hands high, and possibly only fifteen and three fourths hands high. The erroneous part of the description did not apply to any other animal, nor did the correct part apply to any other animal; and, taking the whole description together, it did not apply to any other animal. It was held that the description did not render the mortgage void in any respect.

¹ Bowman v. Roberts, 58 Miss. 126.

A mortgage of ten thousand bushels of corn, contained in cribs "one and two" of a certain elevator, there being three cribs without any numbers to designate them, is too indefinite to enable the mortgagee to hold the corn in any of the cribs as against a depositor of the corn. Grimes v. Cannell (Neb.), 36 N. W. Rep. 479.

² Wagner v. Watts, 2 Cranch C. C. 169. Indiana: Tindall v. Wasson, 74 Ind. 495; Burns v. Harris, 66 Ind. 536; Ebberle v. Mayer, 51 Ind. 235; Duke v. Strickland, 43 Ind. 494; overruling McCord v. Cooper, 30 Ind. 9, where it was held that a description of "three yoke of oxen" in a mort-

gage was too indefinite, and could not be aided by parol evidence; Holmes v. Hinkle, 63 Ind. 518. Maine: Elder v. Miller, 60 Me. 118; Chapin v. Cram, 40 Me. 561; Skowhegan Bank v. Farrar, 46 Me. 293. Illinois: Pike v. Colvin, 67 Ill. 227; Spaulding v. Mozier, 57 Ill. 148; Myers v. Ladd, 26 Ill. 415; Bell v. Prewitt, 62 Ill. 361; Williams v. Merritt, 23 Ill. 623; Beach v. Derby, 19 Ill. 617; Mattingly v. Darwin, 23 Ill. 618. North Carolina: Harris v. Woodard, 96 N. C. 232; 1 S. E. Rep. 544; Goff v. Pope, 83 N. C. 123, 127. Iowa: Citizens' Bank v. Rhutasel, 67 Iowa, 316; Everett v. Brown, 64 Iowa, 420; Smith v. McLean, 24 Iowa, 322. Nebraska: Jordan v. Hamilton Co. Bank, 11 Neb. 499. Other States: Turner v. McFee, 61 Ala. 468; State v. Cabanne, 14 Mo. App. 294; S. C. Ib. 455; Brooks v. Aldrich, 17 N. H. 443; Stephens v. Tucker, 14 N. J. L. 600.

³ Tindall v. Wasson, 74 Ind. 495.

⁴ Ormsby v. Nolan, 69 Iowa, 130; Everett v. Brown, *supra*.

⁵ Sargeant v. Solberg, 22 Wis. 132; Goff v. Pope, 83 N. C. 123.

⁶ Hurt v. Redd, 64 Ala. 85.

⁷ Connally v. Spragins, 66 Ala. 258.

longing to the mortgagor;¹ eight horses now in a certain stable, although at the time the mortgage was executed, and for some time before and afterwards, other horses not belonging to the mortgagor were boarded in the same stable;² ten horses in the mortgagor's possession;³ one horse;⁴ one dark bay mare;⁵ five freight wagons and twenty-five yoke of cattle, being the train now in my possession.⁶

A mortgage of "my entire crop of cotton and corn for the present year," without any other descriptive words, is not void for uncertainty or indefiniteness, but may be rendered sufficiently certain and definite by extrinsic proof.⁷

Where a mortgage was given of the fixtures and furniture of a drug-store, it was held that although oral evidence was not admissible to show what the parties agreed should be included in the word *furniture*, it should be received to identify the articles which did in fact constitute the furniture of the building, and were used by the mortgagor in carrying on his business.⁸

Parol evidence in these and like cases serves to apply the description to the subject matter intended to be embraced in it.⁹

Parol evidence as to the meaning and extent of the terms employed in describing the property, and the sense in which they are used by the parties, is also admissible. Thus, in a mortgage of "one portable saw-mill," parol evidence is admissible to show whether it covers a steam-engine used in connection with it.¹⁰

A mortgage of "my tobacco crop to be grown this year on my own land," to contain a certain number of acres, is a sufficient description to allow the admission of parol evidence to cure any uncertainty.¹¹

Parol evidence is admissible to identify a car-load of lumber, correctly described except as to its location, this being given as at a place to which the parties understood the lumber was to be

¹ Brooks v. Aldrich, 17 N. H. 443.

² Elder v. Miller, 60 Me. 118.

³ Eddy v. Caldwell, 7 Minn. 225.

⁴ Sharpe v. Pearce, 74 N. C. 600.

⁵ Burns v. Harris, 66 Ind. 536.

⁶ Smith v. McLean, 24 Iowa, 322; and see Rowley v. Bartholomew, 37 Iowa, 374.

⁷ Ellis v. Martin, 60 Ala. 394; Smith v. Fields, 79 Ala. 335, 337; Varnum v. The

State, 78 Ala. 28; Hamilton v. Maas, 77 Ala. 283. See, also, Crine v. Tifts, 65 Ga. 644.

⁸ Fore v. Hibbard, 63 Ala. 410.

⁹ Dodge v. Potter, 18 Barb. (N. Y.) 193.

¹⁰ Weber v. Illing, 66 Wis. 79; Osborne v. McAllister, 15 Neb. 428.

¹¹ State v. Logan (N. C.), 6 S. E. Rep. 398.

moved, instead of the actual location at the time of the execution of the mortgage.¹

But parol evidence is not admissible to contradict the terms of a mortgage, by showing that property covered by it was not intended to be embraced in it.² Such evidence must be consistent with the description.³ It cannot be used to supply what the parties have omitted, or to reject a reference in the description which is true.⁴

Under a statute which requires that "a mortgage of chattels shall contain such efficient and full description thereof that the same may be readily and easily known and distinguished," a mortgage of "one sorrel horse" was held void as to others than the parties for want of a sufficient description.⁵

65. A mortgage of all the property now in the shop occupied by me in a town named is not void for uncertainty; but the property may be ascertained by testimony respecting the goods contained in the shop at the time of the delivery of the deed.⁶ And so a mortgage of all the stock, tools, and chattels belonging to the mortgagor "in and about the wheelwright's shop occupied by" him is not void for uncertainty.⁷ The mention in such a mortgage of a specific number of articles of a certain kind, in and about a shop, does not prevent the passing of other articles of the same kind, in and about the shop, under a general description.⁸ And so also a valid mortgage may be made of all the effects and property whatsoever of the mortgagor, without any schedule or particular enumeration and valuation of the property.⁹

A description is sufficiently certain which specifies all the stock of goods, of whatever description, which the mortgagor has at Annona, Texas; also the stock of goods which he has at Dalby Springs, Texas.¹⁰

¹ *Adamson v. Petersen*, 35 Minn. 529.

² *Hurd v. Gallaher*, 14 Iowa, 394.

³ *Hutton v. Arnett*, 51 Ill. 198.

⁴ *Hunt v. Shackelford*, 56 Miss. 397; quoted with approval in *Tindall v. Wasson*, 74 Ind. 495, 502.

⁵ *Montgomery v. Wight*, 8 Mich. 143; *Rose v. Scott*, 17 Q. B. U. C. 385.

⁶ *Burditt v. Hunt*, 25 Me. 419; *Ebberle v. Mayer*, 51 Ind. 235; *Matthews v. Sniffen*, 10 Daly (N. Y.), 200; *Russell v.*

Winne, 37 N. Y. 591; *S. C.* 4 Abb. Pr. (N. S.) 384; *State v. Cooper*, 79 Mo. 464; *Shaw v. Glen*, 37 N. J. Eq. 32, 36.

⁷ *Harding v. Coburn*, 12 Met. (Mass.) 333; and see *Wolfe v. Dorr*, 24 Me. 104; *Burditt v. Hunt*, *supra*; *Welsh v. Lewis*, 71 Ga. 387.

⁸ *Harding v. Coburn*, *supra*.

⁹ *Brinley v. Spring*, 7 Me. 241.

¹⁰ *Crow v. Red River Co. Bank*, 52 Tex. 362. See *Welsh v. Lewis*, *supra*.

A mortgage of all the property "now in the shop occupied by me," though without date, is good, for the date of the delivery of the mortgage may be shown by parol, and the shop referred to may thus be determined.¹ And so a mortgage is good which describes the property as a "store (standing on land of another), and all the goods, wares, and merchandise in and about the same."² So also a mortgage of "all the dry goods, boots and shoes, millinery goods, and gentlemen's furnishing goods and stock in trade now in the store occupied by the mortgagor" is neither fraudulent on its face nor invalid by reason of the generality and indefiniteness of the description.³

A mortgage of a stock of goods, "consisting of groceries, queensware, confectioneries, feed, provisions, and all articles of goods, wares, and merchandise now in stock, and that may hereafter be added, in the store-room now occupied as a grocery store," was held to cover barrels of salt kept for sale as a part of the stock, and stored in a shed used in connection with the store, and also barrels of kerosene oil which had been temporarily removed from the store and were upon the pavement in front of it.⁴

A mortgage of "all the articles of household furniture now contained" in a certain house is good.⁵

A mortgage of "all the desks, chairs, trunks, and office furniture in" a certain office, embraces, as an article of furniture, an iron safe then used in the office.⁶ A mortgage of a stock of goods in a country store, and all fixtures and utensils in the store, was held to cover an iron safe, show-cases, platform scales, copying press, and chandeliers in the store.⁷

Where a mortgage was executed upon a stock of goods and chattels used in carrying on the business, and the evidence showed that a horse, wagon, sleigh, and harness were used in such business, it was held that such chattels were included in the mortgage.⁸

Under a mortgage of a "drug stock" purchased of the mortgagee and located at a place named, it was held to be a question

¹ *Burditt v. Hunt*, 25 Me. 419.

⁵ *Beach v. Derby*, 19 Ill. 617.

² *Wolfe v. Dorr*, 24 Me. 104.

⁶ *Skowhegan Bank v. Farrar*, 46 Me.

³ *Conkling v. Shelley*, 28 N. Y. 360; 293.

and see *Gardner v. McEwen*, 19 N. Y. 123.

⁷ *McCall v. Walter*, 71 Ga. 287.

⁴ *Stephens v. Pence*, 56 Iowa, 257.

⁸ *Arnett v. Trimmer* (N. J.), 11 Atl. Rep. 487, 490.

for the jury whether show-cases, bottles, funnels, etc., pertaining to the drug store were included.¹

Parol evidence is admissible to show that in a mortgage of a stock of goods, together with the fixtures, furniture, and signs of the store, a wooden statue of an elephant was included, inasmuch as this was used as a sign in front of the store during the day, and was taken in at night.²

The mortgage need not show where the property is situated at the time of making it, if the property be otherwise sufficiently described.³

66. Parol evidence may also serve to fix the quantity of goods intended to be covered by the mortgage, when such quantity is left blank. Thus, if ashes in an ashery be the subject matter of a mortgage, but the number of bushels be left blank, this may, as between the parties, be fixed by parol evidence. Even as against creditors, such a mortgage describing the ashes as then being in the ashery of the mortgagor, it appearing that he had no other ashes, is sufficient notice of the property intended to be covered, although the number of bushels be not mentioned, and therefore this omission may be supplied by parol evidence.⁴

Parol evidence is admissible to show that a description in a mortgage of "one ton of brass wire" was intended to cover a particular mass of brass wire, and not the precise amount of one ton in weight to be separated and weighed out of a larger mass. If it appears that the whole amount of the article exceeded one ton only by a few hundred pounds; that the parties treated the entire parcel as the ton of mortgaged wire, pointed it out as such, made no arrangements for taking the weight, or setting apart a portion of it as the wire mortgaged, — these are circumstances which may be properly considered where the language of the instrument is such as admits an explanation by parol. Such a description being loose, giving no location or specification distinguishing it from other brass wire, resort must be had to parol evidence to identify it.⁵ Had it appeared that the mortgagor owned several tons of such wire lying in one parcel, as the de-

¹ *Kern v. Wilson* (Iowa), 35 N. W. Rep. 594.

² *Curtis v. Martz*, 14 Mich. 506.

³ *Adams v. Hill*, 10 Kans. 627.

⁴ *Dunning v. Stearns*, 9 Barb. (N. Y.) 630.

⁵ *Barry v. Bennett*, 7 Met. (Mass.) 354.

scription would clearly indicate that the mortgagor could not have intended to transfer so large a quantity, parol evidence would not be admissible to explain or control the description.

67. Parol evidence is not admissible to show that property not specifically included in it was intended to be embraced. Thus, it cannot be shown, as against a creditor levying upon the property, that a mortgage, in terms covering only a stock of goods, was intended by the parties to embrace the fixtures of the store in which the goods were kept. In such a case, the mortgagee having offered to prove that he and the mortgagor supposed the words used in the mortgage had a meaning different from their obvious and ordinary meaning and import, the testimony to this effect was rejected as incompetent, the court saying: ¹ "Although some of the authorities cited contain the broad statement that the rule inhibiting the production of parol evidence to vary or contradict a valid written instrument does not apply to a controversy between a party to the instrument and a stranger, and that in such controversy either party may prove the real agreement, yet none of these cases, we think, contain an adjudication which would render competent the testimony offered in this case. It would, indeed, be a startling doctrine if it should be held that written instruments, deriving all their force and effect from a record pursuant to the statute, could be explained and enlarged by parol proof of the real, though unexpressed, contract, as against one who became a purchaser, or acquired a lien, relying upon the terms of the recorded instrument."

68. Any change in the property mortgaged by repairing it, or by completing the manufacture of it, will not divest the mortgagee of his property in it, so long as the nature of the article is not changed, or its value materially increased. Thus, a rifle, described in a mortgage of it as having a metallic skeleton stock and an under-action lock, is not so materially changed by having a new wooden stock and an over-action lock substituted by way of repairs, as to defeat the mortgagee's lien.² A mortgage of leather, cut and prepared to be manufactured into shoes, covers shoes subsequently made from such stock by the mortgagor. The

¹ Van Evera v. Davis, 51 Iowa, 637.

² Comins v. Newton, 10 Allen (Mass.), 518.

labor performed by the mortgagor upon the mortgaged stock is an accession to it which passes to the mortgagee.

Even the adding of other articles to the mortgaged property does not always make such a change in it as to invalidate the mortgage. Thus, a mortgage of assorted pickles, which were at the time in bulk and in salt, covers them as against attaching creditors of the mortgagor after the manufacture has been completed, and they have been put into bottles and vinegar.¹

A description of a planing-machine by name, and as being in a certain place, is sufficient, although it be in an unfinished condition. If it be in such a state that, from its appearance, persons acquainted with like machines would know it by the designation given to it in the mortgage, the description is sufficient, although other and material parts are necessary to be added to make it complete.² "The real question is, whether so much of the machine was put together as that it could be denominated a planing-machine in a mortgage or sale without misleading those who know what a planing-machine is? A watch without a mainspring or hands might very properly be described in a mortgage as a watch; and it is clear that some of the material constituents of an article may be wanting, and yet the article be sufficiently designated by its usual name. All that seems necessary in such case of an unfinished or incomplete article is, that so much of it is put together, or exists, as to make it capable of identity as belonging to the description of the article designated. To require more than this would unnecessarily defeat a mortgage or other conveyance; less than this would mislead third persons."³

An agreement that a mortgagee of specific unfinished machinery, or of goods in process of manufacture, shall proceed to complete them for use and sale as security for the payment of the mortgage debt, is not inconsistent with the rights and duties of a mortgagee, and does not invalidate the mortgage.⁴

69. Gathered crops may be identified as the same property described in a mortgage as growing crops. Thus, wheat harvested, threshed, removed and sold in the market, may be identified as the same covered by a mortgage of ten acres of growing

¹ Crosby v. Baker, 6 Allen (Mass.), 295.

² Lawrence v. Evarts, *supra*, per Swan, J.

³ Lawrence v. Evarts, 7 Ohio Stat. 194.

⁴ Smith v. Beattie, 31 N. Y. 542.

wheat.¹ The mortgage vested the title of the growing wheat in the mortgagee, and the recording of it created constructive notice as against a subsequent purchaser or attaching creditor.² The change which it underwent did not change the property so as to divest the title of the mortgagee, or to prevent its identification. And so a mortgage of six acres of grass growing on land occupied by the mortgagor as a tenant, covers hay made from such grass, and stacked upon other land occupied by the mortgagor; and a levy upon the hay and a sale of it upon execution issued against the mortgagor is void as against the mortgagee.³ Of course the hay could be identified as that covered by the mortgage only by parol evidence.

Upon the same principle a mortgage of logs intended for sawing into boards binds the lumber made out of them, but the mortgagee must prove that the lumber was made out of the mortgaged logs.⁴

70. A mortgage of a stock of goods, and any additions thereto, which the mortgagor may make from time to time, is not void for uncertainty, but at law it conveys only the stock on hand at the date of the mortgage.⁵ The fact that it is attempted to embrace in the mortgage property which the mortgagor does not possess at the time does not invalidate the conveyance of that which he then owns and is entitled to mortgage.⁶

71. There can be no substitution of other property in place

¹ *Duke v. Strickland*, 43 Ind. 494, overruling *McCord v. Cooper*, 30 Ind. 9, where it was held that a mortgage of "three yoke of oxen," without further description, did not impart constructive notice of its contents when recorded; that it did not contain a sufficient description to put a purchaser upon inquiry. The oxen in this case remained in the possession and exclusive control of the mortgagor, who sold them to two persons for a valuable consideration, who had no actual notice that the property was affected by the mortgage. The oxen were sold four times for a valuable consideration to *bonâ fide* purchasers, and were finally sold to the defendant for a valuable consideration,

and without actual notice to him of the mortgage.

² *Rider v. Edgar*, 54 Cal. 127; *Hackleman v. Goodman*, 75 Ind. 202.

³ *Smith v. Jenks*, 1 Den. (N. Y.) 580.

⁴ *White v. Brown*, 12 U. C. Q. B. 477.

⁵ *Wagner v. Watts*, 2 Cranch C. C. 169; *Green v. Rogers*, 62 Ga. 166; *Shaw v. Glen*, 37 N. J. Eq. 32, 36. See §§ 138-175. In Georgia a mortgage may by statute cover future purchases of goods. Code 1873, § 1954.

⁶ *Gardner v. McEwen*, 19 N. Y. 123; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Otis v. Sill*, 8 Barb. (N. Y.) 102; *Newell v. Warner*, 44 Barb. (N. Y.) 258

of that described in the mortgage by agreement of the parties, so as to make the mortgage a lien upon the substituted property as against third persons having no actual notice of the agreement; though, as between the parties to such agreement, the mortgage may be a lien upon the substituted property.¹ The registration of the mortgage is not constructive notice to third persons of a lien upon the substituted property, although the description used in the mortgage might apply as well to that property as to the property originally intended. Thus, where a mortgage was made of "one horse," and the mortgagor then owning a sorrel horse, which, with the consent of the mortgagee, he exchanged for a bay horse, the registry imparted notice of a lien upon the former and not upon the latter; for upon inquiry outside the deed a person would have found that the mortgagor then owned the former and not the latter.²

72. The moving of mortgaged goods from the building in which they were at the time of making the mortgage does not destroy the mortgagee's right to them, though it may render it more difficult to identify them. The burden of proving the identity of the goods is upon the mortgagee.³

73. A schedule forms part of a mortgage when the mortgage refers to it as annexed, and as containing a description of the articles mortgaged; and a failure to annex the schedule will invalidate the mortgage, unless this contains a sufficient description of the property without the schedule.⁴ Ordinarily if such a mortgage be offered with the schedule annexed, this will *prima facie* be taken to be the schedule referred to in the deed, and the burden of showing that it was not annexed at the time of the execution of the deed would lie with the party objecting to it. And so where a mortgage described "the following goods and chattels," and there followed a list of articles on a separate paper attached to the mortgage by a wafer, it was held, in the absence of any evidence to the contrary, that presumptively the list was

¹ Powers v. Freeman, 2 Lans. (N. Y.) 127.

² Sharpe v. Pearce, 74 N. C. 600.

³ Wheelden v. Wilson, 44 Me. 1; Brown v. Thompson, 59 Me. 372; State v. Cabanne, 14 Mo. App. 294.

⁴ Weeks v. Maillardet, 14 East, 568; England v. Downs, 2 Bear. 522; Edgell v. Hart, 9 N. Y. 213, 216; Barkman v.

Simmons, 23 Ark. 1; Lund v. Fletcher, 39 Ark. 325.

attached before the execution of the deed. The paper might have been annexed to the deed after its execution; but the mortgage would be incomplete without a schedule, or description, of the mortgaged property, and the schedule attached to it will be taken to be that which completed the deed at the time of its execution.¹

74. The omission to prepare and annex a schedule or inventory referred to in a mortgage does not invalidate it if the description is sufficient to pass the property without it.² Thus a mortgage made of all the furniture in a hotel, "an inventory whereof is to be made and annexed," is a good mortgage of the property in the hotel, though no inventory be annexed. In this case the instrument, by its terms, was intended to be operative from the moment of execution. The making of the inventory was an act to be subsequently performed.³ The omission to annex a schedule may invalidate the mortgage as to some articles, while it will be valid as to all the articles that can be identified without the schedule.⁴ It is a sufficient description to refer to a schedule of the property attached to another mortgage of a date mentioned, made by the same mortgagor to another person. It need not be stated that the mortgage and schedule referred to are on file or recorded; but if they are recorded or filed, and the subsequent mortgage is also properly recorded or filed in the same office, it is notice to all the world.⁵

75. The scope of a mortgage is not enlarged by reference to a schedule for further description by including therein things not within the general terms of the mortgage. Thus a mortgage of a foundry, with the engines, fixtures, machinery, tools, and working plant thereon, described the chattels assigned as being "more particularly enumerated and specified in an inventory of even date herewith, to be signed by the parties hereto and read and construed as forming part of these presents." The deed contained no mention of stock in trade. The inventory, which was signed by the mortgagors on the same day, contained a detailed

¹ *Belknap v. Wendell*, 21 N. H. 175

⁴ *Winslow v. Merchants' Ins. Co.* 4 Met.

² *England v. Downs*, 2 Beav. 522; (Mass.) 306.

Baker v. Richardson, 6 Weekly R. 663.

⁵ *Newman v. Tymeson*, 13 Wis. 172.

³ *Van Heusen v. Radcliff*, 17 N. Y. 580.

description of the engines and other chattels which were mentioned under general heads in the deed. At the bottom of the twentieth page was this clause: "The stock in trade consists of bolts, brass work, wrought and cast iron work, brass and other work, both finished and in preparation. Also all cast and wrought iron, steel, timber, and all other stock in trade, in and upon the before mentioned foundry, workshops, and premises." Then came this clause: "The contents of the twenty preceding sheets is a complete and exact inventory of the fixtures, machinery, utensils, and things in, upon, or about the foundry mortgaged by us this day." It was held that the stock in trade was not included in the mortgage.¹

76. A general clause after an enumeration of particular articles will extend the mortgage over the property embraced in the general terms, if the language clearly indicates the purpose to do so.² Thus, in a mortgage specifically describing furniture and other articles used in connection with a hotel, a general clause, "Together with all other goods, effects, furniture, chattels, property, things of every name and nature now used, attached, situate and being in or about the hotel," will embrace a schooner-rigged sail boat, then upon the water near the hotel, and which was used in connection with it, although four other schooner-rigged sail boats are specially mentioned in the mortgage.³ And so in a mortgage specifically describing a chaise and sleigh and other per-

¹ *Jardine, ex parte*, 10 L. R. Ch. App. 322. Lord Justice James said: "The deed is as clear as a deed can be, and shows no intention to include, but a plain intention to exclude, the stock in trade. The words in the witnessing part are precise, and it has not been attempted to be argued that they could, taken by themselves, include stock in trade. But it is said that the words are enlarged by the inventory. The inventory is not a part of the deed, but is made a part of it for the purpose of giving a more detailed description of the articles included in the deed. In my opinion, the reference in the inventory has no such effect. If something clearly within the terms of the deed had been omitted from the inventory, such omission would not have prevented its passing by the

deed. So, on the other hand, we cannot hold the scope of the deed to be enlarged by a mere reference to a detailed catalogue of the things which were intended to be conveyed. Even if an express intention to include articles not coming within the terms of the deed had been shown by a separate writing, that could not have made the deed operate in a way inconsistent with its plain terms, however it might lay ground for rectifying it. But in the present case it is impossible to conclude that the parties had any intention to include the stock in trade."

² *Russell v. Winne*, 37 N. Y. 591; *S. C.* 4 Abb. Pr. (N. S.) 384; *Sumner v. Blaklee*, 59 N. H. 242.

³ *Veazie v. Somerby*, 5 Allen (Mass.), 280.

sonal property, a general clause, "All the farming tools and other personal property in and about the barn and premises at Herbert Hall," will pass a family carriage belonging to the mortgagor and upon the premises at the time the mortgage was given; and parol evidence that the mortgagor immediately afterwards pointed out this carriage as included in the mortgage is competent evidence to identify it.¹ A mortgage of real property used as a sugar refinery, "and also all the machinery and effects in the said sugar refinery," covers sugar in stock upon the premises.²

77. General words used in connection with a special enumeration of particular articles, ordinarily refer to articles of the same general nature as those specifically named.³ Thus, where one made a mortgage of 1,800 bushels of salt, and his entire fishing material consisting of seine boats and fish stands at Long Branch, and afterwards executed another mortgage conveying all the fishing materials at Long Branch consisting of seine boats, fish stands, "barrels, 1,600 bushels of salt and kegs, subject to prior liens," it appearing that the 1,600 bushels of salt were purchased after the giving of the prior mortgage, and had been kept separate from the salt mentioned in that, it was held that the first mortgage was no lien upon the 1,600 bushels of salt conveyed in the second; that the words "entire fishing material" did not include the barrels and kegs mentioned in the second; and that the words "subject to prior liens," in the second mortgage, did not add to the scope of the previous grant, and include in it anything not included by its own terms.⁴

A mortgage by a railroad company describing specifically many different kinds of property then owned and thereafter to be acquired does not embrace, under the general word "property," municipal bonds, issued to aid in building the road.⁵

A mortgage by a wagon-maker which particularly describes certain property in his shop, and adds, "and all unfinished wood-work in said premises," does not cover a quantity of rough lumber on the premises.⁶

The words "all the furniture" in a certain house, used after an

¹ Goulding v. Swett, 13 Gray (Mass.), 517.

² Thurber v. Minturn, 62 How. (N. Y.) Pr. 27.

³ Brainerd v. Peck, 34 Vt. 496.

⁴ Dixon v. Coke, 77 N. C. 205.

⁵ Smith v. McCullough, 104 U. S. 25.

⁶ Steinecke v. Uetz, 19 Mo. App. 145.

enumerated list of articles mortgaged, include all such articles in the house as were there for common use or ornament, and therefore include pictures, pianos, and billiard tables.¹

General words of description may be modified and restricted by particular words following them. Thus, where a bill of sale was made of "all the household goods and furniture of every kind and description whatsoever" in a certain house, "more particularly set forth in an inventory or schedule of even date herewith," and the schedule did not specify all the household goods and furniture in the house, it was held that no goods passed except those specified in the inventory.²

78. The construction of a mortgage, as regards the subject-matter of it, belongs to the court. This is the case not only when the construction is determined wholly by the terms of the instrument, but also when extrinsic evidence is admitted to show the subject-matter to which the instrument applies. When it becomes necessary to resort to extrinsic evidence to ascertain the true meaning of the instrument, and the extrinsic facts are established by special verdict or otherwise, it becomes the duty of the court to construe the instrument in connection with, and in the light of, such facts, in the same manner as if expressed upon their face. When the facts have not been ascertained, and they are to be ascertained and applied on the trial, it may become necessary for the judge to charge the jury hypothetically, telling them what would be the true construction of the instrument, upon the different states of fact which might be found by them.³

Whether a description of the property contained in a mortgage is sufficient to identify the property is a question of fact to be determined by the jury. It is erroneous for the court to instruct the jury as a matter of law, that certain inaccuracies in the description are not material.⁴

¹ *Sumner v. Blakslee*, 59 N. H. 242.

² *Wood v. Rowcliffe*, 6 Exch. 407; following *Morrell v. Fisher*, 4 Exch. 591; *S. C.* 19 L. J. Exch. 273; *Barton v. Dawes*, 19 L. J. C. B. 302; and see *Kingston v. Chapman*, 9 U. C. C. P. 130; *Gunn v. Ruttan*, 7 U. C. C. P. 516.

See *Baker v. Richardson*, 6 Weekly R. 663, for a description quite similar to the

above in *Wood v. Rowcliffe*, but yet distinguished from it. The particular enumeration was held not to restrain the operation of the general words of the description. For a like decision, see also *Cort v. Sagar*, 3 H. & N. 370; *S. C.* 27 L. J. Ex. 378.

³ *Curtis v. Martz*, 14 Mich. 506.

⁴ *Peterson v. Foli*, 67 Iowa, 402; *Kern v. Wilson* (Iowa), 35 N. W. Rep. 594.

IV. *The Debt Secured.*

79. The debt which the mortgage makes a charge upon the property is that described in the condition of the deed. Therefore, if there be a discrepancy between the consideration mentioned in the commencement of the deed and the debt described in the condition, the latter will control, and the validity of the mortgage will not be affected. The consideration first recited may be more or less than the sum secured in the condition, without making the mortgage fraudulent and void.¹ The sum specified in the condition of the mortgage cannot be varied or contradicted by parol evidence. If this sum be larger than the debt actually due, the debtor can obtain remedy only in a court of equity.²

As against attaching creditors a mortgage is not valid unless there be a distinct and specific condition that can be clearly stated, on performance of which the property would be released. It must be such a demand or claim as can be stated under the requirements of statute so definitely that the sum to be paid by the attaching officer is fixed and certain.³

It is not necessary that the mortgage should secure the payment of a definite sum of money, or that it should secure any money payment whatever. It may secure the performance of any agreement; and in order to render the mortgage operative against third persons, it is not necessary that the agreement should be filed or recorded with the mortgage. Such an agreement is no more a part of the record than a promissory note secured by a mortgage is part of it.⁴

It is not necessary for a mortgagee to show a consideration beyond the recital in the mortgage in a suit against the mortgagor or his representatives, involving simply the title to the property.⁵ But in a suit by a mortgagee against a creditor of the mortgagor who has sold the mortgaged property under an execution, the property having been left in the mortgagor's possession, so that the mortgage was *primâ facie* fraudulent as to creditors, it is

¹ *Kaysing v. Hughes*, 64 Ill. 123.

Upon the general subject of *The debt secured*, see *Jones on Mortgages*, §§ 343-363. The rules upon the subject are the same whether the debt be secured by a mortgage of real or of personal property.

² *Patchin v. Pierce*, 12 Wend. (N. Y.) 61.

³ *Fairfield Bridge Co. v. Nye*, 60 Me. 372.

⁴ *Byram v. Gordon*, 11 Mich. 531; *Hellyer v. Briggs*, 55 Iowa, 185.

⁵ *Webb v. Mann* 3 Mich. 139.

incumbent upon the mortgagee to do away with that evidence, by showing a good and valuable consideration.¹

80. There must be a legal and valid consideration. But anything which is a consideration for a contract in general constitutes a valuable consideration for a chattel mortgage. Thus, where one holding property under a conditional sale makes default, a waiver by the seller of his right to take possession, and an extension of the time of payment, constitute a valuable consideration for a mortgage by the purchaser to the seller.² And so where a mortgage is given upon a stock of goods to secure an existing indebtedness, and the time for the payment thereof is not extended, but the mortgagee goes into immediate possession, under an agreement that the property shall be sold in the usual course of business, the mortgage is not without a present consideration, and is valid.³ A mortgage given to a sheriff or jail-keeper to secure the payment of costs in a criminal proceeding, by a person committed to jail until the same should be paid, is without consideration and void, because the officer has no authority to take such a mortgage, or to release the prisoner.⁴

81. A preëxisting debt is a valuable and sufficient consideration for a mortgage, and protects the mortgagee to the same extent that he would be protected if he had paid a new consideration at the time of the mortgage.⁵

The rule established in *Swift v. Tyson*⁶ in regard to negotiable paper, that a holder for value, before maturity, in the usual course of business, is deemed to have received it for a valuable consideration, though in payment of a preëxisting debt, is enforced by the courts of the United States in all the states as a rule of prop-

¹ *Tift v. Barton*, 4 Den. (N. Y.) 171.

² *Sinker v. Green* (Ind.), 15 N. E. Rep. 266.

³ *Clark v. Barnes* (Iowa), 34 N. W. Rep. 419.

⁴ *McCartney v. Wilson*, 17 Kans. 294.

⁵ *Kranert v. Simon*, 65 Ill. 344; *Butters v. Haughwout*, 42 Ill. 18; *Prior v. White*, 12 Ill. 261; *Louthain v. Miller*, 85 Ind. 161; *Hewitt v. Powers*, 84 Ind. 295; *McLaughlin v. Ward*, 77 Ind. 383; *Gilchrist v. Gough*, 63 Ind. 576; *Busenbarke v.*

Ramey, 53 Ind. 499; *Wright v. Bundy*, 11 Ind. 398; *Machette v. Wanless*, 1 Colo. 225; *Smith v. Worman*, 19 Ohio St. 145; *Paine v. Benton*, 32 Wis. 491; *Turner v. McFee*, 61 Ala. 468; *Steiner v. McCall*, 61 Ala. 406; *Cromelin v. McCauley*, 67 Ala. 542; *Laubenheimer v. McDermott*, 5 Mon. T. 512.

Text quoted with approval in *Turner v. Killian*, 12 Neb. 580.

⁶ 16 Pet. 1; *Railroad Co. v. National Bank*, 102 U. S. 14.

erty, without regard to decisions to the contrary in the state courts. But this rule is not enforced by the United States courts in the case of chattel mortgages given as security for preëxisting debts as against the rule established by the state courts. The necessities of commerce do not require that chattel mortgages shall be placed upon the same footing in all respects as negotiable securities which have come to the hands of a *bonâ fide* holder for value before maturity.¹

The giving of a note for a preëxisting debt after the execution of the mortgage, so as to correspond with the description given in the mortgage, does not vitiate the transaction, though it may be a circumstance tending to show fraud. If the mortgage and notes were really given to secure a *bonâ fide* preëxisting debt, they should be upheld and enforced.²

In New York, and also in several other states, a preëxisting debt is not a sufficient consideration to support a mortgage of personal property against the true owner of the property, one, for instance, from whom the mortgagor obtained the property by fraud. Such a consideration does not constitute the mortgagee a purchaser for value in good faith.³ The existing demand may be properly called a valuable consideration; but a conveyance on such consideration is not one made in *good faith* when it comes in conflict with the title of the true owner, or in conflict with his prior conveyance given for value.⁴

But a mortgage to secure a preëxisting debt is valid as against a general creditor of the mortgagor of whose debt the mortgagee had no notice at the time of taking such mortgage. If at the expiration of a year, instead of renewing the mortgage, the mortgagor executes a new mortgage upon the same property to secure the same debt, the latter mortgage is a valid lien against a creditor who had during the year obtained judgment against the mortgagor; the mortgagee having no knowledge of it when he took the new mortgage.⁵

¹ People's Say. Bank v. Bates, 120 U. S. 556; 7 Sup. C. Rep. 679.

² Prior v. White, 12 Ill. 261.

³ Woodburn v. Chamberlin, 17 Barb. (N. Y.) 446; Thompson v. Van Vechten, 27 N. Y. 568; Van Slyck v. Newton, 10 Hun (N. Y.), 554; Kennedy v. Nat. Union Bank, 23 Hun (N. Y.), 494; Craft v. Rus-

sell, 67 Ala. 9; Meyer v. Evans, 66 Iowa, 179, 184; Overstreet v. Manning (Tex.), 4 So. W. Rep. 248.

See Jones on Mortgages, §§ 347, 458.

⁴ Tiffany v. Warren, 37 Barb. (N. Y.) 571; S. C. 24 How. Pr. 293.

⁵ Walker v. Henry, 85 N. Y. 130. "The giving of a new mortgage, instead of re-

A mortgage to secure a preëxisting debt is good, also, against the mortgagor's assignee for the benefit of his creditors. The assignee takes no better right to the property than the mortgagor had.¹

A subsequent mortgage, given for the consideration of a precedent debt only, is not entitled to preference over a prior unfilled mortgage of the same property, although taken without notice of such prior mortgage.²

82. A contingent liability is a sufficient consideration for a mortgage, and the ratio of the consideration to the value of the property pledged is of no consequence so far as concerns the validity of the transaction.³

A mortgage which appears upon its face to secure an absolute debt, is not fraudulent as to the mortgagor's creditors, because it was in fact given to secure a contingent liability as surety. The mortgage is good for whatever the mortgagee may be required to pay upon the debt for which he has bound himself as surety.⁴

A condition to save the mortgagee harmless, and to indemnify him from all costs, trouble, and expense, in consequence of signing a bond for the mortgagor, entitles the mortgagee, after being compelled by suit to pay the bond, to recover compensation for the trouble and expense thus incurred. The costs, trouble, and expense in such case are not merely those incurred in the suit upon the bond, but also those incurred in resorting to the mortgaged property for indemnity.⁵

A mortgage to a surety conditioned to pay the debt for which the surety is liable, and to save him harmless therefrom, creates a trust and an equitable lien in favor of the creditor; and the surety holds the property subject to such trust and lien, even after the property has become absolute in him by foreclosure.⁶ It is imma-

filing and renewing the same, did not affect the lien of the mortgage, or render it invalid, except that the mortgagee ran the risk of a levy upon an execution after the first mortgage ceased to be a lien, and before a new one was filed." Per Miller, J.

¹ Meyer v. Evans, 66 Iowa, 179.

² Tiffany v. Warren, 37 Barb. (N. Y.) 571.

³ Jewett v. Warren, 12 Mass. 300; Kackley v. State, 91 Ind. 437; Adams v. Niemann, 46 Mich. 135; Sparks v. Wilson (Neb.), 34 N. W. Rep. 111.

⁴ Goodheart v. Johnson, 88 Ill. 58; Kackley v. State, *supra*.

⁵ Robinson v. Hill, 15 N. H. 477.

⁶ Eastman v. Foster, 8 Met. (Mass.) 19; Sparks v. Wilson, 22 Neb. 112.

terial that the principal creditor did not act upon the faith of such security, or even did not know of its existence.¹

83. A mortgage lien may be made contingent upon the insufficiency of a prior security upon other property to satisfy the same debt or undertaking; and in such case the insufficiency of the prior lien must be shown before the second becomes specific and absolute.²

84. A mortgage may be made to secure debts to others besides the mortgagee. If a mortgage be made to a person to secure a debt due to him, and also a debt due to another person, it will be inferred, in the absence of any agreement to the contrary, that the security is given for the benefit of both parties *pro rata* to their respective demands.³

A condition in a mortgage by a calico printer to pay all sums due to the mortgagee, and to all other persons for labor or services in operating the print works, and in any business connected with said print works, whether there or elsewhere, includes the services of one employed under a sealed contract for a stipulated percentage on the gross amount of all sales of prints made at the works, to aid in getting up the styles of the prints, and in superintending that branch of his business, in Providence and New York, and in making sales of prints; but does not include fees due to attorneys at law in defending suits against the mortgagor, and in giving him advice in matters of law relating to his business.⁴

85. It is not necessary that the condition of the mortgage should set forth all the particulars of a note, to secure which the mortgage was given. It is sufficient that the note be so far described that it appears with reasonable certainty to be the note intended to be secured.⁵ Thus, a variance of the note offered in connection with the mortgage from the description in the con-

¹ *Curtis v. Tyler*, 9 Paige (N. Y.) Ch. 432; *Richards v. Yoder*, 10 Neb. 429; *S. C. 6 N. W. Rep.* 629.

² *Trenchard v. Warner*, 18 Ill. 142.

³ See §§ 48, 49. *Jones on Mortgages*, § 135. *Marshall v. Bryant*, 12 Mass. 321, is not to be regarded as an authority on the general principle stated.

⁴ *Spencer v. Pierce*, 5 R. I. 63.

⁵ *Robertson v. Stark*, 15 N. H. 109; *Colby v. Everett*, 10 N. H. 429; *Weber v. Illing*, 66 Wis. 79; *Jones on Mortgages*, § 350.

dition, in that the note is payable with interest *annually*, whereas the mortgage describes the note as payable with interest, is not a material one.¹ It is no objection to a note offered in evidence, as the note secured by a mortgage, that it contains further particulars, as for instance that it is to be paid in teaming at prices specified;² and it is no objection to a note that it is signed by other persons than the mortgagor, while the mortgage does not mention such other persons.³ It does not invalidate the mortgage that it fails to state the date of the note secured.⁴ If the note produced agrees with the general description of it contained in the mortgage, it is *primâ facie* the note secured, although the mortgage omits some of the particulars of the note. A series of notes intended to be secured by a chattel mortgage, but described simply by giving the date, amount, and maturity of each without naming the payee or maker, may be further identified by parol evidence.⁵ The condition of a mortgage to secure the payment "of fifty dollars in sixty days from the date hereof, meaning and intending the legal claims and demands the mortgagee has against me," is not void for uncertainty; the true construction of it being that it secures the payment of the sum due, not exceeding that amount.⁶

A mortgage made to secure a debt of a specified amount is valid if made in good faith, though the debt is in fact represented by seven notes, none of which are described. The identity of the debt may be established by parol, though in making proof the debt must come fairly within the general description.⁷

In Connecticut an exceptional rule prevails requiring a statement in the mortgage of all the essential particulars of the debt or duty intended to be secured in order to make the mortgage operative as against attaching creditors and subsequent purchasers. There is a long line of decisions to this effect in regard to mortgages of real estate; and this same rule applies to mortgages of personal property.⁸ Thus, a mortgage in which the obligation

¹ Webb v. Stone, 24 N. H. 282.

² Robertson v. Stark, 15 N. H. 109.

³ Robertson v. Stark, *supra*.

⁴ Weber v. Illing, 66 Wis. 79.

⁵ Holmes v. Hinkle, 63 Ind. 518.

⁶ North v. Crowell, 11 N. H. 251; and see Machette v. Wanless, 1 Colo. 225; Mich. Insurance Co. v. Brown, 11 Mich. 266.

⁷ Wood v. Weimar, 104 U. S. 786.

⁸ Rood v. Welch, 28 Conn. 157. The later decisions in this state do not sustain the earlier ones; Utley v. Smith, 24 Conn. 290, 314; and even the comparatively more liberal construction adopted in the later decisions has been disapproved of by other courts as too restricted, and impracticable

secured was described as a liability incurred by the mortgagee for the mortgagor, by indorsing at his request "certain promissory notes given to sundry persons," was held to be void because of the uncertainty of the condition; for it gave no information in regard to the dates, amounts, payees, or holders of the notes indorsed, nor any limit to their number, and no clue by which an inquirer could arrive at any safe or satisfactory conclusion as to these matters.

86. When the description of the debt is sufficient to direct a person to the proper source for information as to the amount of the incumbrance, the mortgage will not be held void on the ground of uncertainty in the description of the demand or liability intended to be included.¹ Thus, a mortgage to certain creditors in proportion to their several demands against and liabilities for the mortgagor, sufficiently describes the demands and liabilities intended to be secured.² A condition to secure "all and any notes the said grantees may hold against me" is sufficient.³ A mortgage given to secure all past indebtedness due and owing from the mortgagor to the mortgagee contains a sufficient description of the indebtedness.⁴

It is sufficient to state the gross amount of the indebtedness intended to be secured, though such indebtedness be in fact upon several promissory notes, which, with accrued interest, aggregate such amount.⁵

A mortgage which recognizes a note as an obligation due the mortgagee from the mortgagor will be upheld both in law and equity, although the note was originally made by the mortgagee, if it appears that the payment of it was assumed by the mortgagor, who failed to pay it, and it was thereupon paid by the maker. If property be transferred subject to defeasance in case the note declared to be held and owned by the mortgagee shall be paid by the mortgagor within a year, the mortgagor thereby recognizes the note as that which was unpaid and held by the mortgagee, and which he was bound by agreement to pay; and

in its results. See *Clark v. Hyman*, 55 Iowa, 14, 26; *Hurd v. Robinson*, 11 Ohio St. 232, 234.

¹ *Paine v. Benton*, 32 Wis. 491; *Weber v. Illing*, 66 Wis. 79.

² *Henshaw v. Sumner*, 23 Pick. (Mass.) 446.

³ *Page v. Ordway*, 40 N. H. 253.

⁴ *Machette v. Wanless*, 1 Colo. 225; *Curtis v. Flinn*, 46 Ark. 70.

⁵ *Clark v. Hyman*, 55 Iowa, 14, 23.

there is no reason why a mortgage based upon such a recognition of a note made by the mortgagee, and taken up by him after it had really become the debt of the mortgagor, should not be upheld.¹

87. The omission of a time for the performance of a mortgage does not vitiate it. Thus if a mortgage secure an obligation for the performance of which no time is fixed either by the mortgagor or by separate agreement, the law steps in and requires performance within a reasonable time.²

If the day of payment named in the mortgage be a day earlier than the date of the mortgage, it is in legal effect payable immediately, and as between the parties it is not competent to contradict the express terms of the instrument by the admission of parol evidence that an error in the day of payment was made through a mistake of the draftsman.³

A condition to pay "according to its tenor" a promissory note payable at a day certain, which has passed, is not impossible. The condition must be understood to be for the payment of the note in its then existing state.⁴

88. A mortgage which gives a totally false description of the note intended to be secured cannot be relied upon in an action at law. The mortgagee should first proceed in equity to reform the mortgage. Although the mortgage be made wrong by mistake, the parties are bound by it unless they take some appropriate means of correcting the mistake. The proper way is not to prove the mistake in an action at law, and have the same benefit that might be had of a reformed instrument; but to bring an action to reform the mortgage so that it can have its proper legal effect.⁵

A mortgage conditioned to indemnify the mortgagee against liability, on account of his having become surety for the mortgagor on a bond to dissolve an attachment of goods, does not secure the mortgagee for his liability upon a receipt given to the officer for

¹ *Lonsdale v. Fairbrother*, 10 R. I. 327.

⁵ *Follett v. Heath*, 15 Wis. 601.

² *Byram v. Gordon*, 11 Mich. 531.

On the subject of reforming mortgages,

³ *Fuller v. Acker*, 1 Hill (N. Y.), 473.

see *Jones on Mortgages*, §§ 65-67, 97-99,

⁴ *Pettis v. Kellogg*, 7 Cush. (Mass.) 456.

and 1464.

the goods. The bond would be for the dissolution of the attachment, and the receipt is for a different purpose.¹

A mortgage conditioned to secure two notes particularly described by their amounts and dates does not secure the payment of two notes of the mortgagor, held by the mortgagee for wholly different sums and with different dates.² Yet if the note produced be clearly shown to be a renewal of the note described in the mortgage, the variance thus explained does not invalidate the security.³

But a mortgage intended to indemnify the mortgagee as surety upon the mortgagor's debt to a third person is not void because it describes the debt as due from the mortgagor to the mortgagee.⁴

89. Parol evidence is admissible to identify a note intended to be secured by a mortgage.⁵ Thus, if a mortgage recite an indebtedness in a certain sum, being the amount of two promissory notes made by the mortgagor, and indorsed by the mortgagee, and taken up and paid by him, it may be shown by extrinsic evidence that a third note made by the mortgagor and discounted by the mortgagee was computed and embraced in the indebtedness specified in the mortgage, although such note was not indorsed by the mortgagee. The paper upon which the computation of the indebtedness was made may be put in evidence as serving to identify the note.⁶ Under a mortgage conditioned to secure two notes of one hundred and fifty dollars each, it is competent to show that one of the notes secured was for two hundred dollars.⁷

Parol evidence is admissible to show that a note materially different from that described in the mortgage is a renewal of such note, and in fact secured by the mortgage.⁸ Such evidence is admissible to show that the date of a mortgage which purports to

¹ *Shepardson v. Whipple*, 107 Mass. 279.

² *Jewett v. Preston*, 27 Me. 400.

³ *Barrows v. Turner*, 50 Me. 127.

⁴ *Blincoe v. Lee*, 12 Bush (Ky.), 358; *Varney v. Hawes*, 68 Me. 442.

⁵ *Clark v. Houghton*, 12 Gray (Mass.), 38; *Johns v. Church*, 12 Pick. (Mass.) 557; *Pierce v. Parker*, 4 Met. (Mass.) 80;

Melvin v. Fellows, 33 N. H. 401; *Cushman v. Luther*, 53 N. H. 562; *Clark v. Hyman*, 55 Iowa, 14, 23.

⁶ *Dodge v. Potter*, 18 Barb. (N. Y.) 193.

⁷ *Cushman v. Luther*, 53 N. H. 562.

⁸ *Barrows v. Turner*, 50 Me. 127; *Clark v. Houghton*, 12 Gray (Mass.), 38.

secure a note of the same date is erroneous; and that the mortgage and the note produced were executed at the same time, but by mistake the mortgage was dated a year previous.¹ The record of such a mortgage, notwithstanding the error, is constructive notice of the lien to third parties.²

But parol evidence that the sum expressed in the consideration of the mortgage exceeds the amount justly due is inadmissible, if there be no ambiguity in the instrument, and no fraud be shown.³

90. Parol evidence is admissible to show the purpose for which a mortgage was executed. Thus it may be shown that a mortgage given to a second indorser of a note, to secure its payment, was intended to secure the first indorser as well, and that the mortgagee held the security not only in his own right, but also as trustee for the prior indorser. Such evidence does not contradict or vary the terms or legal effect of the mortgage; it is not inconsistent with its terms.⁴ And so it may be shown that a mortgage for a fixed sum of one thousand dollars was not made to secure a debt due from the mortgagor to the mortgagee, but was made to secure the latter as an accommodation indorser for the mortgagor; that upon the failure of the mortgagor to raise money upon a note for one thousand dollars first indorsed, two notes of five hundred dollars each were substituted in place of that note, and indorsed by the mortgagee; and that it was the purpose of the parties that the mortgage should secure the mortgagee's liability upon the substituted notes.⁵

¹ Partridge v. Swazey, 46 Me. 414; Quinn v. Schmidt, 91 Ill. 84; Clark v. Houghton, 12 Gray (Mass.), 38.

² Partridge v. Swazey, *supra*.

³ Patchin v. Pierce, 12 Wend. (N. Y.) 61.

⁴ Bainbridge v. Richmond, 17 Hun (N. Y.), 391, per Smith, J.: "The most that the defendant can claim is, that as the mortgage did not express the true intent and purpose of the parties, it was liable to suspicion, and the variance was a circumstance to be considered in determining the question of fraud."

⁵ McKinster v. Babcock, 26 N. Y. 378, per Marvin, J.: "The plaintiff had a valid

mortgage as to the mortgagor. He would not have been permitted to impeach it by showing that the consideration was not money advanced to him, and then shutting out evidence of the true consideration. As to the creditors of the mortgagor, the question was whether the mortgage was made without intent to hinder, delay, or defraud them, and this involved the question of consideration. It is undoubtedly always advisable to state, fairly and plainly, the true consideration; and when this is not done, the instrument may be open to suspicion, and the question may be fairly raised whether, in stating an untrue, instead of the true, consideration,

Parol evidence is admissible for the purpose of showing the real consideration for which the mortgage was given; and although the mortgage secures a contemporary note, it may be shown that the real consideration was a preëxisting debt, or that the mortgage was given as an indemnity for making an accommodation note.¹

A mortgage securing a note for a definite sum may be shown to have been given to secure the mortgagor's wages.²

91. A mortgage securing a debt of a fixed amount cannot be extended so as to become a lien for another and different indebtedness not expressed.³ Neither can either party, by parol evidence, substitute a different condition for that expressed in the mortgage.⁴ Thus, where a debtor gave to one of three sureties upon his note a mortgage conditioned to save him harmless on account of such liability, it was held that the debtor could not control the legal import and effect of the instrument by parol evidence that it was his intention to secure the mortgagee only to the amount of one third of the note, under the belief that such security would be a full and perfect indemnity to him for his liability on the note; and the consideration of the mortgage was accordingly expressed in a sum equal to one third of the amount of the note.⁵ The property being expressly conveyed to save the mortgagee harmless from his whole liability, which was for the whole note, the consideration expressed can have no influence in limiting the effect of the instrument, nor can the testimony of the mortgagor be admitted to show an intention different from that expressed.⁶

In Maryland⁷ it is provided by statute that no mortgage, or deed in the nature of a mortgage, shall be a lien or charge on any estate or property for any other or different principal sum or

there was not a design to mislead and deceive the creditors of the mortgagor, or judgment debtor, and to hinder, delay, or defraud them. Our system touching the filing of chattel mortgages, and thus giving notice, may also be taken into account upon the question of intent to defraud. In this case the referee passed upon this question as one of fact, and found that the mortgage was executed in good faith and for a valuable consideration, without

any intent to defraud the creditors of the mortgagor."

¹ *Harrington v. Samples*, 36 Minn. 200.

² *Minor v. Sheehan*, 30 Minn. 419.

³ *Morris v. Tillson*, 81 Ill. 607.

⁴ *Varney v. Hawes*, 68 Me. 442, per Barrows, J.

⁵ *Barker v. Buel*, 5 Cush. (Mass.) 519.

⁶ *Barker v. Buel*, *supra*, per Fletcher, J.

⁷ Code 1878, art. 66, § 43.

sums of money than the principal sum or sums that shall appear on the face of such mortgage, and be specified and recited therein, and particularly mentioned or expressed to be secured thereby at the time of executing the same. This statute does not apply to mortgages to indemnify the mortgagee against loss from being indorser or security.¹

92. The fact that a mortgage was given for a larger sum than was actually due is not conclusive of fraud. It may have been so given by mistake; or it may have been so given to cover further expected advances without any statement on the face of the mortgage that part of the sum named is for such advances;² and it is for the jury to decide whether it was done in fraud of creditors or in good faith.³ Such an overstatement of the debt merely indicates fraud, and it is a question for the jury to determine whether the mortgage was so made in order to hinder and delay creditors.⁴

If a mortgage be given by an insolvent debtor to secure bonds to a large amount which are given to numerous creditors, those holding bonds for sums larger than the debts due them can enforce their claims in equity only for the amounts really due.⁵

The validity of a mortgage is not affected by the fact that the consideration is stated at a sum much larger than the debt actually secured, if the amount of the debt can be ascertained from the face of the mortgage.⁶

93. A condition in a power of sale mortgage must be one for the breach of which the damages are liquidated. The

¹ For a statute in New Hampshire bearing upon this general subject, see § 37.

² *Wood v. Franks*, 67 Cal. 32.

³ *Iowa*: *Wood v. Scott*, 55 Iowa, 114; *S. C.* 7 N. W. Rep. 465; *Van Patten v. Thompson* (Iowa), 34 N. W. Rep. 763. *Wisconsin*: *Kalk v. Fielding*, 50 Wis. 339; *S. C.* 7 N. W. Rep. 296; *Barkow v. Sanger*, 47 Wis. 500; *S. C.* 3 N. W. Rep. 16; *Butts v. Peacock*, 23 Wis. 359; *Blakeslee v. Rossman*, 43 Wis. 116, 123; *Hoey v. Pierron*, 67 Wis. 262; 30 N. W. Rep. 692. *Illinois*: *Wooley v. Fry*, 30 Ill. 158; *Strauss v. Kranert*, 56 Ill. 254; *Up-*

ton v. Craig, 57 Ill. 257. *Michigan*: *Willison v. Desenberg*, 41 Mich. 156. *California*: *Tully v. Harloe*, 35 Cal. 302; *Wood v. Franks*, *supra*. *Minnesota*: *Berry v. O'Connor*, 33 Minn. 29; *Minor v. Sheehan*, 30 Minn. 419.

⁴ See § 339: *Bell v. Prewitt*, 62 Ill. 361; *Kaysing v. Hughes*, 64 Ill. 123; *Kalk v. Fielding*, *supra*; *Bush v. Bush*, 33 Kans. 556.

⁵ *National Bank v. Sprague*, 20 N. J. Eq. 13.

⁶ *Kaysing v. Hughes*, *supra*.

mortgagee in such a mortgage takes the law into his own hands in executing the power of sale. And if the damages are unliquidated he cannot sell the property upon a breach, because he will not be allowed to be his own judge, and assess his own damages, and then sell the property to satisfy them. The damages may be merely nominal, and may therefore give him no right to sell at all.¹

A condition may be too vague and indefinite to constitute the basis of a mortgage lien enforceable by power of sale, even if it be not too vague and uncertain to be the basis of a mortgage enforceable in equity. Such is a condition in a mortgage upon a newspaper establishment, given upon a purchase of it, not to use the columns of the paper, or permit them to be used, to publish matter detrimental to the mortgagee, his reputation or business, which is unlimited in point of time, and designed to accompany the property into the hands of any one who may become a purchaser of the property.²

94. A mortgage made to secure future advances is valid.³ The earlier cases started with the proposition that a mortgage of personal chattels made to secure an existing debt was not invalidated by a further provision intended to cover future advances.⁴

¹ *Fowler v. Hoffman*, 31 Mich. 215, per Cooley, J.

² *Fowler v. Hoffman*, *supra*. Cooley, Justice, giving the opinion, said: "If effect can be given to it at all, it would only be on a construction which would render it intolerable, and under which the publisher could only protect himself against inadvertent violations by putting some one who well understood the mortgagee in all his pecuniary, business, and social relations in position of censor over the columns of his paper, lest something should creep in that in some unexpected manner might be injurious. We are not disposed to assume that such a result was within the contemplation of the parties; but if their agreement falls short of this, it is, in our opinion, too vague, uncertain, and indefinite to constitute the basis of a mortgage and lien enforceable by power of sale."

³ *Jones v. Guaranty & Indemnity Co.*

101 U. S. 622. **Massachusetts**: *Barnard v. Moore*, 8 Allen, 273. **New York**: *Brown v. Kiefer*, 71 N. Y. 610; *Craig v. Tappin*, 2 Sandf. Ch. 78; *Monnot v. Ibert*, 33 Barb. 24; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; *Walker v. Snediker*, 1 Hoff. Ch. 145. **Illinois**: *Speer v. Skinner*, 35 Ill. 282. **Oregon**: *Nicklin v. Betts Spring Co.* 11 Oreg. 406; *Hendrix v. Gore*, 8 Oreg. 406. **Nebraska**: *Miller v. Finn*, 1 Neb. 254, 287. **Arkansas**: *Jarratt v. McDaniel*, 32 Ark. 598; *Curtis v. Flinn*, 46 Ark. 70. **Minnesota**: *Madigan v. Mead*, 31 Minn. 94; *Berry v. O'Connor*, 33 Minn. 29. **Iowa**: *Douglas v. Smith*, 38 N. W. Rep. 163. **Wisconsin**: *First Nat. Bank v. Damm*, 63 Wis. 249; *Carter v. Rewey*, 62 Wis. 552. **West Virginia**: *McCarty v. Chalfant*, 14 W. Va. 531; *Ex parte Ames*, 1 Lowell, 561.

See, in particular, *Ackerman v. Hunsicker*, 85 N. Y. 43, where the subject is examined at length.

⁴ *Lawrence v. Tucker*, 23 How. 14;

While this proposition is true, the broader proposition, that a mortgage may be made to secure a debt which is wholly future, is also true, and has general recognition.¹

If the amount of the advances be defined, and there be a fixed obligation to make them, or the mortgage show upon its face that it was given as a continuing security for advances to a certain amount, it is valid to that amount not only between the parties, but also as against creditors.² To give effect to such a mortgage as against a *bonâ fide* purchaser, or a judgment creditor, it is necessary for the mortgagee to establish by competent evidence the fact that he has made the contemplated advance, or incurred the liability mentioned in the condition, and that the debt or liability is still outstanding.³

95. It does not matter that the amount of the intended advances is not stated, if the purpose for which they are to be made is described.⁴ Even a limitation of the amount of such advances may be controlled by statements of the purposes for which the advances are to be made, so that in equity the mortgage will, as between the parties, protect advances in excess of the sum stated in the mortgage as a limit. Of course the mortgage would not secure a larger sum than that expressed as the limit, as against an intervening mortgagee;⁵ although such mortgagee might waive and postpone his lien until the additional advances under the prior mortgage are satisfied; and he would be regarded as impliedly making such a waiver by verbally assenting to such additional advances.⁶

The limit of the advances may be merely such as shall be made before a date named, and in that case no advances made after that date are secured by the mortgage.⁷

A mortgagee who has become guarantor of the mortgagor to

Badlam v. Tucker, 1 Pick. (Mass.) 389; Holbrook v. Baker, 5 Me. 309; Googins v. Gilmore, 47 Me. 9; Westcott v. Gunn, 4 Duer (N. Y.), 107; Fairbanks v. Bloomfield, 5 Duer (N. Y.), 434; Carpenter v. Blote, 1 E. D. Smith (N. Y.), 491; Page v. Ordway, 40 N. H. 253; North v. Crowell, 11 N. H. 251.

¹ Schnelenburg v. Martin, 1 M'Crary, 348; S. C. 10 Rep. 230; Womble v.

Leach, 83 N. C. 84. See Jones on Mortgages, §§ 364-378.

² Brown v. Kiefer, 71 N. Y. 610.

³ Marsh v. Kinney (N. Y. Supreme Ct. Nov. 1880), 11 N. Y. Weekly Dig. 144.

⁴ Jarratt v. McDaniel, 32 Ark. 598; Curtis v. Flinn, 46 Ark. 70.

⁵ Franklin v. Meyer, 36 Ark. 96.

⁶ Bell v. Radcliff, 32 Ark. 645.

⁷ Fort v. Black (Ark.), 7 S. W. Rep. 131.

third parties for the building of a hotel according to contract, and taken a chattel mortgage to indemnify and secure himself in the payment of whatever sum might be due him on the completion of the contract, by reason of advances and payments in discharge of his guaranty, has a right to make, on the strength of the mortgage, such advances and payments as may be necessary for his discharge from the guaranty, as well *after* notice of the sale of the mortgaged property as before.¹

96. A mortgage need not show upon its face that it was given to secure future advances. It is only necessary that the debt secured be described with such certainty as to enable subsequent creditors to ascertain, either from the condition of the mortgage or by inquiry *aliunde*, the extent of the incumbrance.²

Such a mortgage may be in the form of a security for the payment of a sum certain, leaving the true nature of the transaction to be shown by parol proof. The extent of the security is thus limited to the amount specified in the condition, and of which the registry gives notice.³ But if no advances be made under such a mortgage, it cannot of course be enforced by the mortgagee; nor can it be enforced by his assignee unless it was given to secure negotiable paper, and was assigned before maturity without knowledge on the part of the assignee of preëxisting equities.⁴

¹ Preble v. Conger, 66 Ill. 370.

² Lawrence v. Tucker, 23 How. 14; Shiras v. Caig, 7 Cranch, 34. New York: Craig v. Tappin, 2 Sandf. Ch. 78; Bank of Utica v. Finch, 3 Barb. Ch. 293. Illinois: Speer v. Skinner, 35 Ill. 282; McConnell v. Scott, 67 Ill. 274; Collins v. Carlile, 13 Ill. 254. New Hampshire: North v. Crowell, 11 N. H. 251; Berry v. O'Connor, 33 Minn. 29; Minor v. Sheehan, 30 Minn. 419. Alabama: Tison v. People's Saving & Loan Association, 57 Ala. 323. In Wisconsin, it should appear on the face of the mortgage that it was intended as a continuing security for such advances. Carter v. Rewey, 62 Wis. 552; Butts v. Peacock, 23 Wis. 359; Stein v. Hermann, 23 Wis. 132. And see Stone v. Lane, 10 Allen (Mass.), 74.

³ Monnot v. Ibert, 33 Barb. (N. Y.) 24; Speer v. Skinner, 35 Ill. 282. See Bodley v. Anderson, 2 Bradw. (Ill.) 450. There are, however, some earlier authorities which hold that the intention to secure future advances must be expressed on the face of the instrument, and that a mortgage expressed to be for the security of a present debt cannot be made to cover future advances on the strength of a mere parol agreement. New York: Diver v. McLaughlin, 2 Wend. 596; Jones v. Morey, 2 Cow. 246, 293; Walker v. Snediker, 1 Hoff. Ch. 145. The question was raised but not decided in Wescott v. Gunn, 4 Duer, 107. It is conceived that the prevailing authority supports the statement in the text.

⁴ Judge v. Vogel, 38 Mich. 568.

97. Advances made by a mortgagee after he has actual notice that others have acquired rights in the property will be postponed to the rights acquired by such other persons, unless the mortgagee be under a binding contract to make the advances, or it be essential to his own security to complete the advances contemplated by the mortgage.¹ The general rule is, that a prior mortgagee is affected only by actual notice of a subsequent incumbrance, and not by constructive notice of it;² but there are numerous authorities which hold that if the mortgagee has the option to make the advances or not, as he chooses, the mortgage, as to each advance made upon it, is to be regarded as a fresh mortgage, and is subject to the lien of any incumbrance which has been duly recorded at the time the advance is made, whether the mortgagee has actual notice of it or not.³

A mortgage for future advances is not a valid security as against a judgment creditor of the mortgagor for claims arising after the property has been attached and the mortgagee summoned as trustee of the mortgagor. The mortgagee cannot add a new and independent indebtedness arising after the attachment, either by moneys advanced, services rendered, or liabilities assumed, to defeat the lien by attachment in such case, or to have priority to that lien under the mortgage.⁴ It is even held that the mortgagee cannot, after being thus summoned as trustee, legally give notice and proceed to foreclose the mortgage, to the prejudice of the attaching creditor;⁵ for if he could do this, he might completely defeat the process duly commenced, and the rights acquired under it, and thus render the statute authorizing an attachment in this way wholly nugatory.

98. Such a mortgage cannot be extended to cover advances not contemplated at the time of its execution.⁶ Thus, a mortgage given by a partnership to secure future advances is not effectual to protect advances made, or liabilities incurred, after the

¹ *Speer v. Skinner*, 35 Ill. 282; *Preble v. Conger*, 66 Ill. 370; *Divver v. McLaughlin*, 2 Wend. (N. Y.) 596; *Brinkerhoff v. Marvin*, 5 Johns. (N. Y.) Ch. 320, 326; *Carpenter v. Blote*, 1 E. D. Smith (N. Y.) 491; *Davenport v. McChesney*, 86 N. Y. 242.

² *Jones on Mortgages*, § 372.

³ *Jones on Mortgages*, § 372; *Ackerman v. Hunsiker*, 21 Hun (N. Y.), 53.

⁴ *Barnard v. Moore*, 8 Allen (Mass.), 273.

⁵ *Hobart v. Jouvett*, 6 Cush. (Mass.) 105.

⁶ *Sims v. Mead*, 29 Kans. 124.

dissolution of the firm by the retirement of one of the partners. Whether the mortgage was intended to secure a general balance or particular advances and liabilities, it must be confined to transactions between the original mortgagors and the mortgagee. If the debts and liabilities of the mortgagors, or the balance of account against them, secured by the mortgage, be at any time paid, such payment satisfies and extinguishes the mortgage, and it cannot receive fresh sustenance from dealings between the mortgagee and the firm which succeeds the mortgagors.¹

A mortgage made to secure the mortgagee against indorsements, made or to be made by him for the mortgagor, does not cover a note made by the mortgagee for the accommodation of the mortgagor after the former has taken possession of the mortgaged property, and sold it under his mortgage, and judgment creditors have instituted proceedings to reach the surplus.²

A mortgagee of a cotton crop, who, in order to gather and secure the crop, makes further advances to the mortgagor, does not thereby obtain a lien on the proceeds of the crop in preference to a lien created by a second mortgage executed to a trustee to secure an indebtedness due from the mortgagor to his wife for moneys advanced to him.³

V. *Special Provisions.*

99. A provision that the mortgagee shall release such part of the mortgaged property as the mortgagor may sell, upon receipt of a stipulated price therefor, or upon the payment of a proportionate part of the mortgage debt, is not infrequently inserted in mortgages. Such a provision is not an authority to sell generally, but is a conditional authority, the condition being the payment of the money agreed upon, and this condition is to be fully performed before the title of the mortgagee is divested.⁴ This would be the construction of the provision not only as between the parties, but as against one claiming as a purchaser from the mortgagor, if the provision were recorded as part of the mortgage.

¹ Monnot v. Ibert, 33 Barb. (N. Y.) 24.

judgment creditors had obtained an equitable lien upon the surplus fund.

² Davenport v. McChesney, 86 N. Y.

³ Weathersbee v. Farrar (N. C.), 3 S. E. Rep. 482.

243. 1st. Because the note was not a liability within the strict terms of the mortgage. 2d. The security of the mortgage was extinguished by the act of the mortgagee before making the note. 3d. The

⁴ Whitney v. Heywood, 6 Cush. (Mass.) 82.

A mortgage of farming stock and tools made to secure the payment of several notes of eight hundred dollars each, provided that the mortgagee should have a lien upon the crops upon the farm until the sum of eight hundred dollars should be paid; that when said sum should be paid the mortgagee should release all security upon the live stock; and when the further sum of two hundred dollars should be paid he should release all security upon the tools upon the farm. The construction of the mortgage was held to be, that upon the payment of the first eight hundred dollars with interest thereon, the lien upon the live stock should be discharged.¹

100. It is usual for a mortgage to contain an insurance clause whereby the mortgagor covenants with the mortgagee to keep the property insured for his benefit. The law applicable to this clause, as used in mortgages of personal property, does not differ materially from that applicable to a similar clause used in mortgages of real property. For this reason no extended statement of the law will be made here.² The mortgagor has an insurable interest in the property to the full value of the goods insured; and the mortgagee has an insurable interest measured by the amount for which he holds the mortgage as security.³ Each acting independently may insure his own interest; but the more usual course is for the mortgagor to obtain a policy of insurance payable to the mortgagee in case of loss, in pursuance of a covenant to insure for his benefit.

Upon the happening of a loss, the mortgagee is entitled to the insurance money to the amount of the debt due him, though the mortgage be not recorded.⁴

A stipulation to insure property "for the full amount due" on the mortgage contemplates an insurance to the extent of the amount secured by the mortgage and remaining unpaid, and not merely the amount that has already become payable.⁵

Upon breach of a covenant to insure, the mortgagee may very

¹ *Brigham v. Avery*, 48 Vt. 602.

² Reference may be had to the chapter upon Insurance in the author's work upon Mortgages, §§ 396-427.

³ *Appleton Iron Co. v. British Am.*

Ass. Co. 46 Wis. 23; *S. C.* 8 Ins. L. J. 177.

⁴ *Manson v. Phoenix Ins. Co.* 64 Wis. 26.

⁵ *Fowler v. Hoffman*, 31 Mich. 215.

properly insure ; and he can add the premium, if fair and reasonable, to the debt secured.¹

An executory contract by a mortgagee to assign his mortgage does not deprive him of his right to insure, nor does a partial payment under such contract limit his recovery to the amount of the unpaid purchase money.²

The nature of the title of a mortgagee of personal property is different from that which, in some states, a mortgagee of real property has ; for, while in some states a mortgagee of real property is regarded as holding only a lien upon the realty without having any legal title to it, the rule, almost without exception, is that a mortgagee of personal property has a legal title to the mortgaged chattels, even before the debt is due, and may take immediate possession of them, unless restrained by express stipulations in the mortgage.³ Therefore it is held that under a policy which provides that “if any change takes place in the title or possession, whether by legal process or judicial decree, said policy shall be void,” an adjudication of the mortgagor as a bankrupt, and an assignment of his property under an order of court to a trustee or assignee, does not avoid the policy ; for the title remains in the mortgagee as it was before the assignment.⁴

If the mortgagor insures property as his own, without disclosing a chattel mortgage upon it, he violates a condition of the policy that the interest of the assured shall be truly stated, and renders the policy void.⁵

Under a policy conditioned to become void if the property shall be incumbered by mortgage, a chattel mortgage of part of the property insured makes the policy void as to the articles mortgaged.⁶

Notice of intention to foreclose a mortgage avoids a policy of insurance upon the property conditioned to be void if the title to the property be transferred or changed, and providing that the “entry of a foreclosure of a mortgage shall be deemed an alienation of the property.” There would be no occasion to declare

¹ Leland v. Collver, 34 Mich. 418.

² Haley v. Manufacturers' F. & M. Ins. Co. 120 Mass. 292 ; Davis v. Quincy Mut. F. Ins. Co. 10 Allen (Mass.), 113.

³ See § 1 ; Woodward v. Republic F. Ins. Co. 32 Hun (N. Y.), 365, 372.

⁴ Appleton Iron Co. v. British Am. Ass.

Co. 46 Wis. 23 ; S. C. 8 Ins. L. J. 177 ; and see Bragg v. N. E. Mut. F. Ins. Co. 25 N. H. 289.

⁵ Woodward v. Republic F. Ins. Co. *supra*.

⁶ Dacey v. Agricultural Ins. Co. 21 Hun (N. Y.), 83.

the contract void upon foreclosure of a mortgage, inasmuch as the law would say that. The meaning of the provision is, that something short of an actual and complete foreclosure shall be considered, for the purposes of the contract, as a transfer or change of title, and that any act which of itself, and without any further formality or process on the part of the mortgagee, will deprive the assured of all right and title in the property, unless he pay the debt, shall be deemed sufficient to terminate the risk.¹

101. A covenant in a chattel mortgage that the mortgagor will warrant and defend the property is merely a warranty of title. It is not broken by his using up or disposing of the property. He does not thereby undertake to forever keep the property, or to protect it.²

The mortgagor's covenant of ownership and warranty of title estops him from denying his ownership in an action of trover brought against him by the mortgagee upon his refusal to deliver the property after default; and it is immaterial that both parties knew at the time the mortgage was given that part of the chattels belonged to a third person. Evidence that would contradict the deed is inadmissible. Such a mortgage is good as between the parties.³

VI. *Execution and Delivery.*

102. It is not necessary that a mortgage of personalty should be executed under seal.⁴ Though the mortgage be in the form of a deed, and purport to be sealed, the omission of the seal does not invalidate it.⁵ A chattel mortgage is only a bill of sale with a defeasance; and a sale of personal property is never required to be by deed. It is not unusual to execute chattel mortgages as deeds, and the forms given in the books, and even those prescribed by statute,⁶ may sometimes include a seal. But the term *mortgage*, used in a statute relating to personal property, does not import or imply that a seal is necessary.⁷

¹ McIntire v. Norwich F. Ins. Co. 102 Mass. 230.

² Weed v. Covill, 14 Barb. (N. Y.) 242.

³ Harvey v. Harvey, 13 R. I. 598.

⁴ Despatch Line of Packets v. Bellamy Manufacturing Co. 12 N. H. 205; Gerrey v. White, 47 Me. 504; Tapley v. Butterfield, 1 Met. (Mass.) 515; Milton v. J.

Mosher, 7 Ib. 244; Sherman v. Fitch, 98 Mass. 59, 64; Cook v. Harrison, 19 Bradw. (Ill.) 402.

⁵ Gibson v. Warden, 14 Wall. 244; Gerrey v. White, 47 Me. 504.

⁶ As in Maryland; see § 35.

⁷ Gibson v. Warden, *supra*, per Swayne, J.

If a mortgage be signed by the mortgagor by mark only, and the subscribing witnesses also signed by mark only, and neither of them is able to identify the marks or the paper, the execution of the instrument may be proved by the testimony of the mortgagee, or of any other person who saw the maker execute it.¹

103. Parol evidence is admissible to show when a mortgage deed without date was executed and delivered.² The admission of such evidence is not in violation of the rule which excludes testimony that tends to vary or contradict the terms of a deed. And so when it is material to determine the date of the execution of an instrument with reference to the validity of a record of it under a statute requiring the recording of it within a limited time after its execution, it may be shown by parol evidence that a mistake was made in the date of the mortgage; its date being only *prima facie* evidence of the time of its execution.³

If a mortgage be dated, it is presumed, until it is proved otherwise, that it was executed and delivered at its date.⁴ The date of an acknowledgment, or the time of its record, will serve to fix the date of execution as not later than such time.⁵

The date of a mortgage not under seal may be shown by parol evidence to be erroneous.⁶ Thus it may be shown that a mortgage was by mistake dated a year prior to the date of the note, they in fact having been made and delivered at the same time.⁷

A mistake in the date of the certificate of acknowledgment is immaterial, when it appears that the mortgage was recorded on the day of its execution, for no injury could result from the error to creditors or purchasers.⁸

104. A delivery and acceptance of the mortgage are essential to its validity.⁹ Without these there is no mortgage, but only an attempt at one, or a proposition to make one. It is true,

¹ Jones v. Hough, 77 Ala. 437. As to proof where there are subscribing witnesses, see Askew v. Steiner, 76 Ala. 218; Russell v. Walker, 73 Ala. 315.

² Burditt v. Hunt, 25 Me. 419.

³ Stonebreaker v. Kerr, 40 Ind. 186.

⁴ Foster v. Perkins, 42 Me. 168; Briggs v. Fleming, 112 Ind. 313.

⁵ Merrill v. Dawson, Hemp. 563.

⁶ Briggs v. Fleming (Ind.), 14 N. E. Rep. 86; Johnson v. Stellwagen (Mich.), 34 N. W. Rep. 252.

⁷ Partridge v. Swazey, 46 Me. 414; Clark v. Houghton, 12 Gray (Mass.), 38.

⁸ Durfee v. Grinnell, 69 Ill. 371.

⁹ Jewett v. Preston, 27 Me. 400; Foster v. Perkins, 42 Me. 168.

however, that although there may be no valid delivery of a mortgage at the time of its execution, a subsequent delivery will avail against those who have not in the mean time acquired rights to the property or interests in it.

A mortgage executed by a debtor to his creditor without the knowledge of the latter, and without authority from him, and delivered to a stranger or to the mortgagor's attorney for his use, does not vest the title to the property in the mortgagee as of the time of such delivery, as between him and a creditor of the mortgagor who has acquired an interest in it by attachment or levy of execution between the time of such delivery and the mortgagee's acceptance of the mortgage after receiving notice of it.¹ Such a case is to be distinguished from one where the mortgagor has received previous authority or direction from the mortgagee to execute the mortgage, or has received general authority to act as his agent to loan money and to take any security for its payment at his discretion.²

105. An authorized agent may accept a delivery for his

¹ *Miller v. Blinbury*, 21 Wis. 676; *Welch v. Sackett*, 12 Wis. 243. Dixon, C. J., delivered an elaborate opinion in the latter case, saying: "The idea that a contract could be thus made, and that title to property could pass into a party without his knowledge or consent, and out of him without any motion or act of his signifying his willingness, but merely by his refusal to receive it at all, had its origin at a period in the history of the common law when the legal mind, instead of being governed in its conclusions by a steady application of the clear and rational principles of the law to plain matter of fact, and by arguments to be drawn therefrom, was too frequently influenced by a mysterious and fanciful logic, that depended for its support upon artfully devised fictions and falsehoods, which for the most part were as repugnant to reason as they were unnecessary to the proper administration of justice. The discovery that such things could be done is, I believe, attributable to the inventive skill of Justice Ventris, as exhibited in the case of *Thompson v. Leach*, 2 Vent. 198, decided about the year 1690 ;

at least several courts and judges since that time, with many complaints, have agreed in giving him the credit of having proved something on this subject which none of them could understand. The substance of his proposition is, that a deed of lands made to a party, without his knowledge or consent, and placed in the hands of a third person for his use, is a medium for the transmission of the title to the grantee, and takes effect so as to vest it in him the instant the deed is parted with by the grantor, and if the grantee, upon receiving knowledge of it, rejects it, such rejection has the effect of revesting the title in the grantor by a species of remitter." The learned judge, after examining this argument at length, concludes that it is not founded in reason, and is not entitled to be regarded as giving any foundation to the doctrine announced. And see *McCutchin v. Platt*, 22 Wis. 561, where the deed was sent by mail, and the property was attached after the deed was deposited in the post-office, but before it reached the creditor.

² *Sargeant v. Solberg*, 22 Wis. 132.

principal;¹ and it has been held that he may do this even when he was himself the mortgagor. Thus, an agent to whom money was sent to be invested at his discretion applied it to his own use, and executed to his principal a chattel mortgage as security. He delivered the mortgage to another, who was not however authorized to act for the principal, and he also caused the mortgage to be filed for record. He wrote informing the principal of the use he had made of the money, and of the security he had given; but the principal never received this letter. The mortgaged property having been taken under execution upon a judgment against the agent, the principal was allowed to recover it, upon the ground that the agent was authorized to act for the principal in accepting a delivery of the mortgage.² “But could the agent apply the money to his own use, and execute and file the mortgage for the use of the principal? It is assumed that he could not do this, and that it was a clear violation of his duty thus to appropriate the money. However the rule might be if the principal were dissatisfied with the use which had been made of his money, and were endeavoring to repudiate the transaction, clearly the mortgage is only void at his election. If he choose to ratify what has been done by his agent, and treat the mortgage as valid, upon what principle of law or public policy can strangers interfere and claim that the mortgage is void because the agent made an unauthorized use of the money? Here the mortgagee is satisfied with the security, has fully ratified and approved the use made of his money, and seeks to have the benefit of the security. It seems to us that if the principal is satisfied with the loan and security, others have no right to complain. They cannot avoid the chattel mortgage made by the agent for the benefit of the principal, even if it be conceded that, under the circumstances, the principal might have treated the transaction as unauthorized.”³

106. The delivery of a mortgage to the recorder, or the filing it in the proper office by the mortgagor, is not in itself such a

¹ *Field v. Fisher* (Mich.), 32 N. W. 838.*

In this case a chattel mortgage was executed under an agreement between parties that the debt should be secured, the form of security not having been specified, and was delivered to the creditor's attorney,

who filed it for record. This was held to be a sufficient delivery.

² *Sargeant v. Solberg*, 22 Wis. 132. As to a delivery to the wife of the mortgagee, see *Jaffrey v. Brown*, 29 Fed. Rep. 476, 481, per Spear, J.

³ Per Cole, J., delivering the judgment in *Sargeant v. Solberg*, *supra*.

delivery as will operate to give the mortgagee any title under it, prior to his actual acceptance of the security,¹ except in case there be a prior agreement of the parties that the mortgage shall be executed and so delivered for record or filing.² "It is well settled, that under an agreement between the parties that one shall make a deed to the other, and deliver the same to the register of deeds for registry, and for the benefit or use of the grantee, the making of such deed and leaving the same with the register, for such purposes, constitute a good delivery of the deed to the grantee, without any further act."³ But it is not necessary that the evidence should go so far as to constitute the register an agent of the mortgagee to receive the mortgage. It is sufficient if it be shown that at the time the debt was created the mortgagor agreed to secure it by mortgage, and accordingly made and left the mortgage for record, and the mortgagee soon afterwards took possession of the property, and later obtained from the recorder a copy of the mortgage. The fact that the original mortgage in such case after it was recorded was lost or stolen from the recorder's office, or was accidentally destroyed while there, so that it never actually came into the hands of the mortgagee, is not sufficient to defeat its operation as a valid subsisting mortgage.⁴

But a delivery of a mortgage to the recorder for record without the knowledge of the mortgagee, more than a year after the mortgagor agreed to secure the mortgagee by such a mortgage, is not necessarily a valid delivery of the mortgage, but only evidence of such delivery to be submitted to the jury.⁵ And it has even been held that an antecedent agreement to give a mortgage, if the agreement be to give a mortgage upon property not defined by the parties, will not make a delivery of the instrument for record effectual against a levy of attachment or execution upon the property before an actual delivery to the mortgagee.⁶

¹ *Wadsworth v. Barlow*, 68 Iowa, 599; *Cobb v. Chase*, 54 Iowa, 253; *S. C. 6 N. W. Rep. 300*; *Day v. Griffith*, 15 Iowa, 104; *McCourt v. Myers*, 8 Wis. 236; *Oxnard v. Blake*, 45 Me. 602; *Dole v. Bodman*, 3 Met. (Mass.) 139; *Maynard v. Maynard*, 10 Mass. 456; *Wallis v. Taylor* (Tex.), 3 So. W. Rep. 321; *National State Bank v. Morse* (Iowa), 34 N. W. Rep. 803.

rington v. Brittan, 23 Wis. 541; *Jordan v. Farnsworth*, 15 Gray (Mass.), 517.

² *Thayer v. Stark*, 6 Cush. (Mass.) 11, per Dewey, J., 13.

³ *Thayer v. Stark*, *supra*.

⁴ *Jordan v. Farnsworth*, 15 Gray (Mass.), 517.

⁵ *Cobb v. Chase*, 54 Iowa, 253; *S. C. 6 N. W. Rep. 300*; *Day v. Griffith*, 15 Iowa, 104.

⁶ *Cooper v. Jackson*, 4 Wis. 537; *Har-*

107. But the mortgagor's delivery of a mortgage of specific property to the recorder, in pursuance of an agreement to do so, is effectual. Thus, a resident of Iowa having borrowed a sum of money of a resident of Ohio, under an agreement that the payment of the same should be secured by a mortgage of personal property belonging to the debtor in Iowa, and that he should take it to the recorder's office and leave it for record and pay the recorder's fee, and having executed and delivered the mortgage for record as agreed, such delivery was held to be complete and effectual against a creditor who on the same day attached the property¹ on a writ against the mortgagor. Although the specific property upon which security was to be given was not agreed upon by the parties, it was fairly to be inferred that the debtor should select the property to be included in the mortgage, because the creditor's residence was hundreds of miles from the property, and it was not contemplated that he should be present at the execution of the mortgage. The creditor had never seen the property, and, so far as it appeared, he never expected to see it. The jury found, from the contract of the parties and the surrounding circumstances, that the creditor authorized the debtor to select property to be included in the mortgage, and the court declared that it was competent for the creditor to invest the debtor with this authority.

108. Mere knowledge on the part of the mortgagee of the existence of the mortgage is not sufficient without an acceptance of it, or a ratification of it. Not only is the mere execution and filing of a mortgage insufficient to constitute an acceptance,² but

¹ *Everett v. Whitney*, 55 Iowa, 146; *S. C. 7 N. W. Rep.* 487. The court refer to the cases of *Day v. Griffith*, 15 Iowa, 104, and *Cobb v. Chase*, 54 Iowa, 253; *S. C. 6 N. W. Rep.* 300 (see § 108), saying: "In the former case there was an agreement that the debt should be secured, but no specific property nor character of security was referred to. The debtor, without the knowledge of his creditor, executed and filed for record a chattel mortgage. It was held that there was no delivery as against an intervening attaching creditor. In the latter case, it was agreed that the debtor should execute a

chattel mortgage upon some cows and other stock, but the animals were not specially pointed out nor agreed upon. Afterwards the debtor, in the absence of the creditor, and without his knowledge, executed a mortgage upon certain cattle, and filed it for record. It was held that this was not a delivery as against an attaching creditor." The present case differs from those in the important particulars mentioned in the text.

To like effect, see *Capital City Bank v. Hodgkin*, 24 Fed. Rep. 1.

² *Day v. Griffith*, 15 Iowa, 104.

knowledge on the part of the mortgagee, before other rights have intervened, that a mortgage of property not definitely agreed upon has been made to him, is also insufficient for this purpose. Thus where there was an agreement between a debtor and his creditor that a mortgage should be given upon a certain kind of property to secure the debt, but the specific property was not pointed out or agreed upon, it was held that the making and filing of a mortgage upon the class of property specified was not sufficient to give such mortgage priority over an attachment levied thereon prior to the actual delivery of the mortgage, although the mortgagee was informed by the recorder, before the levy was made, that such a mortgage to him had been filed for record.¹

109. A delivery to one mortgagee of a mortgage made to several to secure a several debt to each is a sufficient delivery to all. It is not competent for the mortgagor to restrain the operation of the mortgage, by the use of words, so as to give it effect as his deed to one of the grantees, and prevent it from having that effect as to the others, for the operation of the mortgage deed must be ascertained from its terms, and cannot be varied by parol evidence.² "It makes no difference, in our opinion," said Chief Justice Shaw, "that the grant was defeasible upon the payment of several sums to the several mortgagees. That might affect the right of redemption, and the mode of obtaining a discharge of the mortgage. But the question here is as to the effect of the deed, before redemption, upon the right of property; and we have no doubt that it vested a right of property in all the mortgagees, either as joint tenants or tenants in common, and, for the purpose of this defence, it is immaterial which."

If several mortgages are made by a debtor at one time, to secure several creditors, the refusal of one of them, on being informed of the mortgage, to accept it, does not impair the mortgages accepted by the other creditors.³ On the contrary, the mortgage which is first ratified will take precedence; and the others will become operative and take precedence in the order of

¹ Cobb v. Chase, 54 Iowa, 253; S. C. 6 N. W. Rep. 300. Adams, C. J., remarked that where a person agrees with another to mortgage to him specific property, and in pursuance of the agreement executes a mortgage upon the property and files it

for record, there is much reason for holding that such mortgage is to be deemed accepted by the mortgagee.

² Hubby v. Hubby, 5 Cush. (Mass.) 516.

³ Brown v. Platt, 8 Bosw. (N. Y.) 324.

their ratification ;¹ but such a mortgage which is not ratified will never take effect.

110. Proof of the delivery of the mortgage by the mortgagor for record, and its subsequent possession by the mortgagee, is sufficient, in the absence of other proof, to authorize a jury to find its delivery to him.² A delivery of a mortgage by a debtor to his own attorney for record, without the authority of the creditor, may be ratified by the creditor subsequently ;³ but in such case the mortgage becomes a valid security only from the time of such ratification, and not from the original delivery.

111. The fact of the possession of the mortgage note by the mortgagor at the time of his death affords a presumption either that the note had been paid and delivered up, or that it had never been delivered to the mortgagee ; and where the death occurred shortly after the making of the mortgage, the finding of the note in his possession was regarded as a strong circumstance against the good faith and honesty of the mortgage transaction.⁴

112. The question of delivery is always a question of fact for the jury. It is always competent to show by parol evidence that a mortgage was never delivered, and that it therefore never took effect.⁵ And such evidence is admissible to show that it was delivered as an escrow, or that the mortgagee obtained possession of it by fraud, or in any unwarrantable manner.⁶

The question whether a mortgage is properly executed and acknowledged is one of law, to be passed upon by the court.⁷

113. A subsequent ratification by the mortgagee may make an undelivered mortgage valid. When the validity of a mortgage depends upon a subsequent ratification of its execution, no new record of the mortgage is necessary. The ratification relates back to the original execution of the mortgage.⁸

A mortgage made without the creditor's knowledge cannot be

¹ Oxnard v. Blake, 45 Me. 602.

124; Jordan v. Farnsworth, 15 Gray (Mass.), 517.

² Molineux v. Coburn, 6 Gray (Mass.),

124; Foster v. Perkins, 42 Me. 168.

³ Roberts v. Jackson, 1 Wend. (N. Y.)

⁴ Brown v. Platt, 8 Bosw. (N. Y.) 324.

478.

⁵ Bullock v. Narrott, 49 Ill. 62.

⁷ Bullock v. Narrott, 49 Ill. 62.

⁶ Molineux v. Coburn, 6 Gray (Mass.),

⁸ Sherman v. Fitch, 98 Mass. 59.

ratified and made effectual by him after an assignment in bankruptcy or insolvency of the debtor's property. Although the recording of a mortgage is equivalent to an actual delivery, the record is of no effect until the mortgage is delivered.¹ The debtor cannot appoint an agent to act in behalf of his creditor and make an effectual delivery to him.

¹ *Dole v. Bodman*, 3 Met. (Mass.) 139.

CHAPTER III.

SUBJECT MATTER OF CHATTEL MORTGAGES.

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|---|---|
| I. What present interests are subject to mortgage, 114-120. | II. Statutory limitations of the subject matter of mortgages, 121, 122. |
| | III. Mortgages of fixtures, 123-137. |

I. *What Present Interests are subject to Mortgage.*

114. In general any property which is capable of absolute sale may be mortgaged.¹ All claims growing out of and adhering to property, rights of action for damages *ex contractu*, and interests in actions pending and undetermined, may be the subject of a mortgage.² It does not matter that the property is exempt from attachment and from levy and sale upon execution, for such exemption is merely a privilege which the law confers upon a debtor, and not a limitation imposed upon his power to dispose of his own property as he may choose.³ The mortgagee, however, must foreclose the mortgage in order to take advantage of the debtor's waiver of his privilege. If the creditor, instead of foreclosing, obtains judgment upon the mortgage debt, and levies upon the property mortgaged, the debtor may claim his exemption.⁴

It is not necessary that the mortgagor shall have the absolute and entire title to property which is the subject matter of his mortgage. A limited or special interest in property is sufficient to support a mortgage of it. One occupying and cultivating land under an agreement that he shall have part of the crops produced

¹ *Dorsey v. Hall*, 7 Neb. 460; *Kimball v. Sattley*, 55 Vt. 285, 290, per Veazey, J.

² *Pindell v. Grooms*, 18 B. Mon. (Ky.) 501.

³ See §§ 57, 58. *Love v. Blair*, 72 Ind. 281; *Rice v. Nolan*, 33 Kans. 28. Where a mortgagor reserved his "personal property exemption allowed by law and to be

selected by him," it was held that the title to the whole of it passed to the mortgagee, and remained in him, until the exempted articles were legally set apart; and that a second mortgage of a part of the property is not a selection of such part as exempt. *Norman v. Craft*, 90 N. C. 211.

⁴ *Low v. Tandy* (Tex.), 8 So. W. Rep. 620.

has an interest in the crops which he may mortgage; but if there be an agreement that the crops shall belong to the owner of the land, and that the tenant, after paying him for certain advances, should have a certain undivided portion of the crop, the tenant has no interest which he can sell or mortgage.¹ And so one occupying land of another, under an agreement that the grass should belong to the person in occupation, may make a valid transfer of the growing grass by way of a personal mortgage.²

An estate for years which is of such duration of term as to come within the recording acts relating to the conveyance of real property is an interest in the realty, and should be recorded as real property;³ but if the term is of less duration, the mortgage should be recorded as personal property.⁴ A mortgage of such a term should be recorded as a mortgage of personal property. If the mortgagee take and retain possession of the estate, it will be as free from liability to answer an execution against the mortgagor as would any other personal estate.⁵

A life insurance policy may be the subject of a chattel mortgage.⁶ So may shares of stock in a corporation.⁷

115. The owner of a chattel not in possession may make a valid mortgage of it if the person in possession professedly holds under him, and has only a special property in the thing, such, for instance, as that conferred by a pledge⁸ or a lien,⁹ under an attachment,¹⁰ or under a distress warrant.¹¹ Thus, a horse which had been taken from the mortgagor in a replevin suit may be mortgaged by him before final judgment, and while the property is subject to restitution. If the mortgagor obtains a judgment, not for the return of the horse, but for the value of it, the benefit of such judgment passes to the mortgagee. The mortgagee's

¹ *Ponder v. Rhea*, 32 Ark. 435; *Leland v. Sprague*, 28 Vt. 746.

² *Jencks v. Smith*, 1 N. Y. 90; *S. C.* 1 Denio, 580.

³ *Boyle Ice-Machine Co. v. Gould* (Cal.), 14 Pac. Rep. 609.

⁴ *Jones on Mortgages*, § 471.

⁵ *Bismark Building & Loan Asso v Bolster*, 92 Pa. St. 123.

⁶ *King v. Van Vleck* (N. Y.), 16 N. E. Rep. 546.

⁷ *Campbell v. Woodstock Iron Co.* (Ala.) 3 So. Rep. 369; *Gilmer v. Morris*, 80 Ala. 78, 89.

⁸ *M'Calla v. Bullock*, 2 Bibb (Ky.), 288.

⁹ *Pindell v. Grooms*, 18 B. Mon. (Ky.) 501.

¹⁰ *Appleton v. Bancroft*, 10 Met. (Mass.) 231.

¹¹ *Hughes v. Stubblefield*, 21 Ill. App. 216.

equitable title is, moreover, paramount to any lien or claim upon the property arising subsequently to the mortgage.¹

The owner of a chattel has a mortgageable interest in it after default of a prior mortgage of the same, until foreclosure is completed. The junior mortgagee has, until that time, a right to redeem.²

116. Mere possession of personal property of another, when no title or interest accompanies the possession, confers no power to mortgage the property, even in favor of one taking the mortgage for a valuable consideration without notice.³ A mortgage alone is no evidence of the mortgagor's title or possession. But if the mortgagor's possession be proved, his making a mortgage is an act of dominion and some evidence of title.⁴

Yet a mortgagee for value and in good faith, of goods in possession of one who has obtained them by false pretences, will hold them against the first vendor, provided the latter voluntarily parted with the possession, and intended to part with the title.⁵ It is true, as a general rule, that no one can transfer a better title than he himself has; and it is true also, as a general rule, that fraud vitiates any contract. But these general propositions are subject to qualifications or exceptions; and one of these is that a vendor, by voluntarily putting a vendee in possession of goods, though induced to do so by fraud, puts it in the power of his vendee to treat the goods as his own in dealing with others, and virtually gives him authority to pass the title to others. The vendor has trusted the vendee, and should suffer loss if loss is to fall upon him or upon a purchaser or mortgagee, who, on the credit of the property, has parted with value to the person in possession.

Therefore a mortgage executed by one in possession of the property as owner, although he holds possession under an agreement that the legal title was not to pass to him until the chattels were paid for, such contract of conditional sale not having been filed

¹ *Pindell v. Grooms*, 18 B. Mon. (Ky.) 501; *Case v. Woleben*, 52 Iowa, 389.

² *Smith v. Coolbaugh*, 21 Wis. 427.

³ *Glaze v. Blake*, 56 Ala. 379; *Waters v. Cox*, 2 Bradw. (Ill.) 129; *Stanley v. Gaylord*, 1 Cush. (Mass.) 536; *Jewell v. Simpson* (Kans.), 16 Pac. Rep. 450.

⁴ *Eames v. Snell* (Mass.), 9 N. E. Rep. 522. And see *Warner v. Wilson* (Iowa), 36 N. W. Rep. 719.

⁵ *Malcom v. Loveridge*, 13 Barb. (N. Y.) 372.

for record, will take precedence over the secret lien of the seller under his conditional sale.¹

117. An interest in property, which one may perfect by fulfilling an executory contract, may in equity be the subject of a mortgage. Thus, there may be such a mortgage of one's interest in a herd of cattle, which by contract he is to feed for a year, at the end of which time he is to have half of the herd for his trouble and expense.²

One who is in possession of chattels under a lease, by the terms of which he is to pay for them by instalments until the entire price is paid, when the claim of the lessor is to cease, the lessor in the mean time having the right, upon failure in the payment of any instalment, to take possession and terminate the lease, has such a right of property in them that he can convey a good title in the mortgage, as against an officer who attaches them as the property of the lessee, although there has been a failure by the lessee to pay an instalment due, provided the lessor has not taken possession.³

So, also, one in possession of property under a conditional sale, may mortgage his interest, such as it is, and on payment of the price the mortgage will become valid.⁴ Of course the mortgagee's title may be defeated by the prior incumbrance, or by the failure of the mortgagor to fulfil the condition of his purchase.⁵

An agreement between a vendor and vendee that the title to the property shall not pass until it is paid for, is valid and binding between the parties themselves, and no title vests in the vendee, though possession be delivered to him; and the vendor, upon the failure of the vendee to comply with the condition, may retake the property from the vendee, or from any one claiming through him, though he be a purchaser or mortgagee in good faith, and without notice of the condition.⁶ A purchaser of property, other than

¹ Manning v. Cunningham, 21 Neb. 288; 31 N. W. Rep. 933; Moline Plow Co. v. Braden, 71 Iowa, 141. And see Peters v. Parsons, 18 Neb. 191.

² Forman v. Proctor, 9 B. Mon. (Ky.) 124.

³ Chase v. Ingalls, 122 Mass. 381; Harrington v. King, 121 Mass. 269; Currier v. Knapp, 117 Mass. 324.

⁴ Crompton v. Pratt, 105 Mass. 255. And see Day v. Bassett, 102 Mass. 445; Everett v. Hall, 67 Me. 497; Greenaway v. Fuller, 47 Mich. 557; S. C. 11 N. W. Rep. 384.

⁵ Holman v. Lock, 51 Ala. 287.

⁶ Blackwell v. Walker (C. C. Ark. 1880), 5 Fed. Rep. 419, where numerous authorities are cited; Coggill v. Hartford

commercial paper, acquires no better title than his vendor possessed. In Illinois, however, an exceptional doctrine upon this subject prevails, and it is held that, as to purchasers and creditors of the vendee, such agreement is fraudulent and void, and as to them the property must be considered as belonging to the vendee in possession; and therefore he can make a valid mortgage of it.¹

But a vendee under such a conditional sale, who has not taken possession of the property, has no interest in it which he can transfer by sale or mortgage.²

118. On the other hand, a vendor who has sold chattels conditionally may mortgage his interest. Thus, if he has delivered them upon condition that the title shall not pass to the purchaser until paid for, he may, at any time before the price is wholly paid, mortgage them to another person, and the mortgagee will acquire a title superior to that of the conditional vendee.³ It is not material that payments have been made towards a title before the recording of the mortgage, so long as the payments are not in full; and it matters not how near the purchaser comes to acquiring a title, so long as he falls short of it. "It is a general rule that when a man hath a thing he may condition with it as he will; for the maxim is *cujus est dare ejus est disponere*."⁴ The purchaser has no title so long as the condition remains unperformed. He might, under some circumstances, have a lien in equity for advances made before the recording of the mortgage, but a court of law could take no account of such a lien.⁵

Under a contract for building a ship or making any other chattel, not subsisting at the time *in specie*, no property vests in the purchaser during the progress of the work, nor until the vessel or other chattel is finished and ready for delivery. In the mean time the builder or maker may make a valid mortgage of the property in its unfinished state, or a lien may attach to it for labor and materials used in its construction. This is true even

& New Haven R. R. Co. 3 Gray (Mass.), 545; Benner v. Puffer, 114 Mass. 376; Ballard v. Burgett, 40 N. Y. 314; Hart v. Carpenter, 24 Conn. 427; Thorpe v. Fowler, 57 Iowa, 541; S. C. 11 N. W. Rep. 3.

¹ McCormick v. Hadden, 37 Ill. 370;

Ohio & Miss. R. R. Co. v. Kerr, 49 Ill. 458; Ketchum v. Watson, 24 Ill. 591; Ib. 592.

² Doyle v. Mizner, 40 Mich. 160.

³ Everett v. Hall, 67 Me. 497.

⁴ Shepard's Touchstone, 118.

⁵ Everett v. Hall, *supra*, per Peters, J.

when the purchaser has advanced money on account from time to time during the progress of the work, under a contract stipulating that he should have a lien on the chattel and on all the materials provided for its construction. Such a contract does not transfer the property to the purchaser, or deprive the builder of the power to mortgage it.¹

119. A mortgage of property to which the mortgagor has no title may be ratified and made valid by the subsequent acts or declarations of the owner. Thus, a husband having mortgaged property belonging to his wife to secure a debt of his own, the mortgagee afterwards threatened to foreclose, and demanded more security, whereupon the wife said to him that he had a mortgage on all the personal property already. The jury were authorized to infer from this not only that she knew of the mortgage, but that she meant the mortgagee to understand that it was a valid security. The wife could not maintain replevin for the property against the mortgagee.²

The mortgagee, or those claiming under him, may also acquire title to the mortgaged chattels by adverse possession as against the true owner.³

A mortgage containing covenants of ownership and warranty estops the mortgagor from denying his ownership. Even if articles are included in a mortgage, which not only the mortgagor but the mortgagee also knew to belong to a third person, and both participated in a fraud, actual or attempted, in including such articles in the mortgage, yet, in an action of trover by the mortgagee against the mortgagor to recover all the chattels mentioned in the mortgage, the latter will not be allowed to set up a title to some of them in a third person. Of course the mortgage is ineffectual to convey the title of the third person, but the mortgage is effectual between the parties, and the attempted fraud of both parties does not prevent the mortgagee from claiming the benefit of the estoppel.⁴

So if one about to take a mortgage of personal property ask another if he claims any interest in it, and the reply is that he

¹ *Wright v. Tetlow*, 99 Mass. 397; *Briggs v. A Light Boat*, 7 Allen (Mass.), 287.

² *Merrill v. Parker*, 112 Mass. 250.

³ *Chapin v. Freeland*, 142 Mass. 383.

⁴ *Harvey v. Harvey*, 13 R. I. 598; *S. C.* 15 Rep. 156. See, however, *McIntosh v. Parker* (Ala.), 3 So. Rep. 19.

does not, such admission estops the latter from afterwards claiming any interest as against the mortgagee.¹

But the owner is not estopped by his declarations from asserting title to the property, if it appear that the mortgagee claiming the estoppel has not acted or rested upon such declarations, and that he will not suffer loss if they are not conclusively held to be true.²

120. A mortgage of property, the sale of which is forbidden by statute, passes the title to it. Thus, a mortgage of spirituous liquors, the sale of which is prohibited, passes a title which will sustain an action against one taking them without authority; for spirituous liquors are still property, and although the seller commits an offence for which he is punishable, he does not retain the property. The purchaser commits no offence whether he take an absolute title or a defeasible one. Neither is a mortgage of such property invalidated by a provision in it that the proceeds of any sale of the property made by the mortgagor shall be applied to the purchase of articles of the same kind, to be held subject to the mortgage. Such a provision, neither expressly nor by just implication, authorizes the mortgagee to make any sale of the mortgaged property in violation of the law. Even if the mortgage had contained an express authority to the mortgagor to sell the liquors illegally, and thus had made the mortgagee a participator in the illegal act of keeping liquors for sale, he would not be precluded from maintaining an action against one who had wrongfully converted his property, though he might become liable to the penalties of the statute.³

A mortgage of intoxicating liquors, though it be a contract made void by statute, when carried into effect by a delivery of possession to the mortgagee, passes the title to the property, and is good not only against the mortgagor, but also as against his creditors.⁴

In Kansas, however, it is held that a chattel mortgage on property which includes intoxicating liquors is void, not only as to the liquor, but as to all the property embraced in the mortgage.⁵

¹ Richardson v. Seybold, 76 Ind. 58.

² Winegar v. Fowler, 82 N. Y. 315.

³ Cobb v. Farr, 16 Gray (Mass.) 597.

⁴ Bagg v. Jerome, 7 Mich. 145.

⁵ Flersheim v. Cary (Kans.), 17 Pac. Rep. 825; Korman v. Henry, 32 Kans.

49; 3 Pac. Rep. 764; Gerlach v. Skinner,

34 Kans. 86; 8 Pac. Rep. 257.

One who has assumed and agreed to pay such a mortgage is not estopped from denying its validity.¹

II. *Statutory Limitations of the Subject Matter of Mortgages.*

121. In a few states there are statutes which restrict the giving of chattel mortgages to specific articles or classes of personal property. Thus in California,² mortgages may be made upon locomotives, engines, and other stock of a railroad; steam-boat machinery, and machinery used by machinists, foundry-men, and mechanics; steam-engines and boilers; mining machinery; printing-presses and material; professional libraries; instruments of surveyors, physicians, or dentists; upholstery and furniture used in hotels, lodging or boarding houses, when mortgaged to secure the purchase money of the articles mortgaged; growing crops; vessels of more than five tons' burden; instruments, negatives, furniture and fixtures of a photograph gallery; the machinery, casks, pipes, tubes, and utensils used in the manufacture or storage of wine, fruit brandy, fruit syrups, or sugar; also wines, fruit brandy, fruit syrup, or sugar, with the cooperage in which the same is contained; pianos and organs.

In Wyoming it is provided that a mortgage may be made of possessory claims to public lands, all buildings, fences, ranches and improvements thereon; all quartz, coal, and other mining claims, and all such personal property as shall be fixed in its structure to the soil; all neat cattle or herds of cattle, horses, mules, sheep, or other live stock; and any and all other personal property owned, occupied, or in possession of such mortgagor at the time of making such bond, conveyance, or instrument intended to operate as a mortgage, and also all personal property of like kind and character as that described in such mortgage, bond, conveyance, or instrument intended to operate as a mort-

¹ Flersheim v. Cary, *supra*.

² 1 Civil Code, §§ 2955-2958; Amendments 1887, ch. 8.

The furniture and fixtures of a saloon are not among the property which may be mortgaged under this provision. Gassner v. Patterson, 23 Cal. 299.

To render a mortgage of furniture and upholstery in a hotel or boarding-house valid, it must appear that it was actually used for such purpose. Stringer v. Davis, 30 Cal. 318.

If a mortgage of the upholstery and furniture of a hotel be made to secure the purchase money or other property bought to be used in the hotel, it is void. Duffey v. Shields, 63 Cal. 332.

A mortgage of property which cannot be mortgaged under the provisions of this act is governed by the rules of the common law. Wildman v. Radenaker, 20 Cal. 615.

gage, thereafter to be acquired, owned, occupied, or possessed by such mortgagor.¹

In Idaho Territory chattel mortgages may be made upon all property, goods, or chattels, not defined by statute to be real estate.²

In New Hampshire³ personal property and crops of every description, whether the same have or have not come to maturity, are subject to mortgage.

In Michigan⁴ no chattel mortgage or other incumbrance upon the library of any corporation formed for literary or scientific purposes is valid. No mortgage of personal property exempt from levy and sale under execution save tools, implements, materials, and other things used by the debtor to carry on his trade or profession, is valid, unless it be signed by the wife of the mortgagor, if he have any.⁵

In Connecticut⁶ it is provided that if any manufacturing or mechanical establishment, together with the machinery, engines or implements situated and used therein; or any printing, publishing, or engraving establishment, together with the machinery, engines, implements, cases, types, cuts, or plates, situated and used therein; or any dwelling-house, together with the household furniture belonging to its owner, and used therein by him in housekeeping; or any building containing hay or tobacco in the leaf, together with such hay or tobacco, or any of the personal property above mentioned, without the real estate in which the same is situated or used, shall be mortgaged by a deed containing a condition of defeasance, and a particular description of such personal property, executed, acknowledged, and recorded, as mortgages of lands, the retention by the mortgagor of the possession of such personal property shall not impair the title of the mortgagee.⁷

¹ R. S. 1887, § 76.

² R. S. 1887, § 3385.

³ G. S. 1878, ch. 137, § 1.

⁴ Laws 1877, No. 155.

⁵ Compiled Laws 1871, § 6101.

⁶ G. S. 1888, § 3016.

⁷ A mortgage of movable machinery left in possession of the mortgagor is void against his attaching creditors, unless the statute requirement that the mortgage shall contain a particular description of

such machinery be complied with. *Gaylor v. Harding*, 37 Conn. 508. But neither the statute nor the common law requires such particular description of machinery mortgaged with the mill in which it is situated and used, when actually delivered with the mill into the possession of, and held by, the mortgagee. The want of it might perhaps afford some evidence of fraud, but would probably fall short of

In Pennsylvania all iron ore mined and prepared for use, pig iron, blooms, and rolled or hammered iron, in sheets or bars, iron and steel nails, steel ingots and billets, rolled or hammered steel in sheets, bars or plates, and all steel and iron castings of every description, not in place, may be mortgaged for any sum, not less than five hundred dollars, by an instrument in writing signed by the owner thereof, or by his agent duly constituted, and duly acknowledged before some person authorized by law to take acknowledgments of deeds.¹

In Utah Territory no mortgage can be made of personal property exempt from seizure and sale under execution, except as security for the purchase money thereof.²

In Wisconsin a chattel mortgage upon household furniture is not valid unless the same be signed by the wife of the mortgagor, if he be a married man, and her signature witnessed by two witnesses.³

122. Where a chattel mortgage can be made only upon certain classes of property specifically mentioned by statute, to render a mortgage valid it must be shown that it embraces property specified by the statute. Thus, under a statute of the State of California authorizing mortgages of upholstery and furniture used in hotels, lodging or boarding houses, to secure the purchase money, the mortgagee must allege and prove that the furniture and upholstery were actually used in a hotel, lodging or boarding house.⁴

Under the statute of Connecticut authorizing the mortgaging of a dwelling-house, together with the household furniture belonging to its owner, and used therein by him in housekeeping, a mortgage of such furniture is valid, when shown to be so used by the mortgagor, although it also constitutes the furniture of a hotel kept by him.⁵

making even a *prima facie* case of it. *Howe v. Keeler*, 27 Conn. 538.

In Vermont it is provided that machinery attached or used in any shop, mill, printing-office, or factory, might be mortgaged by deed acknowledged, executed, and recorded, as deeds of real estate. Such mortgages may be assigned, discharged,

or foreclosed like mortgages of real estate. R. L. 1880, § 1980; G. S. 1862, ch. 108, § 5.

¹ Laws 1887, p. 73, No. 32.

² Laws 1884, ch. 21, § 13.

³ Laws 1885, ch. 218.

⁴ *Stringer v. Davis*, 30 Cal. 318.

⁵ *Croswell v. Allis*, 25 Conn. 301.

III. *Mortgages of Fixtures.*

123. A building erected by one person on the land of another may be mortgaged as personal property, if it was so erected under an understanding or agreement that it might be removed at any time.¹ *Primâ facie* such a building would be a fixture, and would not be removable.² The legal effect of putting it on another's land is to make it part of the freehold; and to sustain a mortgage of it as personal property, an agreement of the parties controlling the legal effect of the transaction must be proved. If the mortgagor, after mortgaging such a building, remove it to other land which he subsequently purchases, and then mortgages the land to another with the buildings and fixtures thereon, but the latter mortgagee has full knowledge of the prior chattel mortgage, this will have priority over the mortgage of the land.³ If the owner of the land purchase such building after it has been mortgaged, the lien is not thereupon extinguished.⁴

Buildings erected under an agreement with the owner of land to convey it to the builder upon his paying a certain sum within a limited time are not strictly personal property; but they are fixtures and constitute a part of the realty. The builder has an equitable interest in the realty, and not a pure ownership of the buildings as chattels; and therefore a mortgage by him of the buildings should be recorded as a mortgage of real estate and not as a chattel mortgage.⁵

Where a building has been erected by a tenant whose lease gives him the right of removal at the expiration of the lease, this right must be exercised within a reasonable time; and one who has taken from him a chattel mortgage upon the building acquires no better right than the tenant had, and cannot remove the building after the tenant's right of removal has expired.⁶

¹ *Smith v. Benson*, 1 Hill (N. Y.), 176; *Lanphere v. Lowe*, 3 Neb. 131, 134, 137; *Denham v. Sankey*, 38 Iowa, 269; *Goodenow v. Allen*, 68 Me. 308; *Deering v. Ladd*, 22 Fed. Rep. 575, a case of a mortgage of an elevator built on railroad land under license; *Docking v. Frazell*, 34 Kans. 29; 17 Pac. Rep. 160, a case of a hotel moved upon leased land.

Upon the general subject of Fixtures, see *Jones on Mortgages*, §§ 428-455.

² *Price v. Malott*, 85 Ind. 266; *Docking v. Frazell*, *supra*.

³ *Simons v. Pierce*, 16 Ohio St. 215. And see *Burrill v. Wilcox Lumber Co.* (Mich.) 32 N. W. Rep. 824.

⁴ *Denham v. Sankey*, 38 Iowa, 269.

⁵ *Eastman v. Foster*, 8 Met. (Mass.) 19.

⁶ *Smith v. Park*, 31 Minn. 70.

124. Fixtures may become chattels by agreement of parties as between themselves. Many things ordinarily considered fixtures to the realty may become to all intents and purposes personal property, by agreement of all parties interested in both the realty and fixtures.¹ The owner of machinery or other things in the nature of fixtures may treat them as personal property, and by executing a chattel mortgage of them is estopped from asserting, as against such mortgage, that they are part of the real estate.² The holder of a subsequent chattel mortgage of such fixtures, after taking possession of them as personal property, and removing them, is estopped to deny that they are personal property, as against one who claims them under a prior chattel mortgage.³

There is a limitation upon the right of parties to change the status of property by agreement, arising from the essential character of the property itself, and the mode of its annexation to the realty.⁴ "It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot in general be changed by the convention of the parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or other materials of which the walls of a house were composed. Rights by way of license might be created in such a subject, but it could not be made alienable as chattels, or subjected to the general rules by which the succession of that species of property is regulated. But it is otherwise with things which, being originally personal in their nature, are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to, the things real with which they are connected; though their connection with the land or other real estate is such that in the absence of an agreement, or of any special relation between the parties in interest, they would be a part of the real estate."⁵

¹ *Smith v. Waggoner*, 50 Wis. 155; *S. C.* 6 N. W. Rep. 568; *Ford v. Cobb*, 20 N. Y. 344; *Godard v. Gould*, 14 Barb. (N. Y.) 662; *Shell v. Haywood*, 16 Pa. St. 523. And see *Hensley v. Brodie*, 16 Ark. 511; *Gooding v. Riley*, 50 N. H. 400; *Docking v. Frazell*, *supra*.

² *Corcoran v. Webster*, 50 Wis. 125; *S. C.* 6 N. W. Rep. 513.

³ *Smith v. Waggoner*, *supra*; *Manwaring v. Jenison*, 61 Mich. 117, 135, per *Morse, J.*

⁴ *Fortman v. Goepper*, 14 Ohio St. 558.

⁵ *Ford v. Cobb*, 20 N. Y. 344, 348, per *Denio, J.* See § 132.

125. The courts of a few states, particularly those of New York and Illinois, accord very great efficacy to the mortgagor's agreement that fixtures shall remain chattels, so as to give effect to a chattel mortgage of them, as against subsequent purchasers and mortgagees of the land. They go even to the extent of holding that a chattel mortgage executed in view that the chattels are about to be annexed to the realty is sufficient evidence of the intention and agreement of the parties that they are to retain their character as personal property.¹ An express agreement in the mortgage between the owner of the land and the owner of the chattels, that the character of the latter shall not be changed by annexation, but that the mortgagee in case of default might enter and remove them,² may make the intention of the parties more emphatic, but apparently it is not regarded as essential, or as having any legal effect which the fact of the mortgage alone would not have. A provision that the mortgagee may enter and take possession of the mortgaged chattels in case of a default, also manifests an intention that the property should retain its character of personalty after its annexation and use as part of the realty; but doubtless the mortgage, without such provision, would sufficiently manifest such intention.³

But even under this view chattels may be so annexed to the freehold in a permanent manner, and incorporated with it as a permanent accession to the realty, that the fact that the property is already subject to a chattel mortgage is not sufficient to preserve its personal character, either as against an existing or subsequent mortgagee of the realty. "It comes to this: A man employs a carpenter and mason to build a brick house for him upon his lot, and pays them in full the price agreed upon. The mason

¹ *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 10 Hun, 420; *S. C.* 75 N. Y. 542; *Kinsey v. Bailey*, 9 Hun (N. Y.), 452; *Eaves v. Estes*, 10 Kans. 314; *S. C.* 15 Am. Rep. 345; *Sword v. Low* (Ill.), 13 N. E. Rep. 826. In the latter case, Shope, J., reviewed the decisions, and in conclusion said: "We think that where the mortgagor and mortgagee agree that the property shall be treated as personalty, and the mortgagor covenants that it shall be subject to seizure and sale as a chattel upon the maturity and non-payment of the debt,

that the article retains its character as a chattel, and does not become a part of the realty, where the character of the personalty and mode of attachment is such that it may be removed without material injury to the freehold."

² *Tift v. Horton*, 53 N. Y. 377.

³ As in *Ford v. Cobb*, *supra*, and *Sisson v. Hibbard*, *supra*; *Eaves v. Estes*, *supra*. The New York cases seem to be in some confusion. Compare the cases cited with *Voorhees v. McGinnis*, 48 N. Y. 278.

puts his brick in the walls. The carpenter places his joists and timbers in the proper places in the house. The house is finished and is occupied by the owner. It then appears that the maker of the brick held a chattel mortgage upon them, executed by the mason, and that the sawyer of the timber held a chattel mortgage upon it, executed by the carpenter. Are these articles, now a part of the house, still held upon the chattel mortgages, so that the creditors can despoil the house to obtain their possession, or compel the owner to pay their value? I take it they are not. Their character as personal property is ended. They have become a part of the house; they are real estate; will pass under a deed of the land; may be subjected by a mortgage of the land, or may be held by the owner of the house.”¹

126. One who has sold fixtures by bill of sale may be estopped to claim afterwards that they are parcel of the realty. Thus the owner of a brewery in selling it conveyed the real estate by deed, and the stock in trade and fixtures by bill of sale, and took back a mortgage of the real estate to secure the payment of a portion of the purchase money. The purchaser afterwards executed a chattel mortgage of the fixtures. In a controversy between the mortgagee of the realty and the mortgagee of the fixtures, it was held, that inasmuch as the deed, bill of sale, and mortgage of the realty were executed at the same time, and were parts of the same transaction, each should be held to have been designed by the parties to perform its appropriate office in consummating the sale, and that, as between the former and the latter, the property included in the bill of sale should be regarded as personalty.²

But the fact that property personal in its nature, and not incorporated with the realty, has, in transmission of title to the mortgagor, passed by a deed of the land, and that there has been a long existing localization of such property, does not destroy its character as personal property.³ Of course an effectual mortgage of such property can only be made by a delivery of it, or by a chattel mortgage duly recorded.⁴

¹ Voorhees v. McGinnis, 48 N. Y. 278, 287, per Hunt, J.; and see Pierce v. George, 108 Mass. 78.

² Fortman v. Goepper, 14 Ohio St. 558.

³ Keeler v. Keeler, 31 N. J. Eq. 181; Williamson v. N. J. Southern R. R. Co. 29 N. J. Eq. 311, 328.

⁴ Sturgis v. Warren, 11 Vt. 433.

127. It is more generally held that an agreement of parties will avail to make fixtures personal property as against creditors of the mortgagor, when it avails for this purpose between the parties themselves; for creditors levying upon the property, and others purchasing it upon execution sale, stand in a different position from *bond fide* purchasers without notice: they acquire only the rights which the judgment debtor had.¹ Therefore where the makers of an engine and boiler sold them to a manufacturer of stoves, to be set up in a cheap board building upon land belonging to the latter, and for the purchase money received a chattel mortgage, it being understood between the parties that the mortgage should be valid notwithstanding any annexation of the chattels to the realty, the mortgage was held good against a purchaser of the land upon execution issued upon a judgment recovered against the mortgagor. As between the mortgagor and mortgagees, the former would clearly not be permitted to set up that the machinery had become real estate; and the purchaser of the premises upon execution could acquire no greater rights. The rights and equities of the mortgagees existed before the recovery of the judgment against the mortgagor, and are superior to those acquired under the levy of the execution. The annexation of the chattels to the realty is deemed to have been made by the mortgagor in pursuance of and subject to his agreement with the mortgagees, and not as a permanent accession to the freehold.²

In Illinois this doctrine is extended so as to affect even *bond fide* purchasers, and it is held that one who has given a chattel mortgage for the purchase price of personal property, such for instance as a boiler and engine, and afterwards gives a real estate mortgage on the land upon which the boiler and engine are placed, is estopped from claiming the boiler and engine as against the vendor; and the real estate mortgagee stands in no different or better position than the mortgagor himself.³

An agreement made upon the sale of machinery to a manufacturing company, which is in legal effect a sale upon conditional payment, will protect the vendor against every one except a *bond*

¹ Manwaring v. Jenison, 61 Mich. 117.

² Sisson v. Hibbard, 75 N. Y. 542; see, also, Western Union Telegraph Co. v. Burlington & Southwestern Ry. Co. 11 Fed. Rep. 1; Sword v. Low (Ill.), 13 N. E. Rep. 826; Manwaring v. Jenison, 61 Mich.

117. Nursery stock is severed from the freehold by the giving of a chattel mortgage thereon. Duffus v. Bangs, 43 Hun (N. Y.), 52. See § 134.

³ Sword v. Low (Ill.), *supra*.

fide purchaser until the purchase money is paid, and then it is immaterial that he took as security a mortgage void for want of capacity in the corporation to give it.¹

128. But whether as against subsequent purchasers without notice the character of property can be changed by such agreement from realty to personalty is a different question; and while the authorities are not in entire harmony, the better opinion is that such purchasers are not bound unless they have notice of the agreement before acquiring title. Ordinarily they are entitled to claim and hold everything which appears to be, and by its ordinary nature is, a part of the realty. To hold otherwise would contravene the policy of the laws requiring conveyances of interests in real estate to be recorded. It would seriously endanger the rights of purchasers, afford opportunities for frauds, and introduce uncertainty and confusion into land titles.² This is the doctrine established in Massachusetts, New Jersey, Kansas, and other states.³

A subsequent attaching creditor, though he becomes a purchaser of the property upon an execution sale under such attachment, is not regarded as a *bonâ fide* purchaser without notice. He acquires no greater interest in the property than the judgment debtor himself had.⁴

129. It is not competent for an owner of real estate to

¹ *Coman v. Lakey*, 80 N. Y. 345. For a case where the agreement was held to be a mortgage, and not a conditional sale, see *Heryford v. Davis*, 102 U. S. 235.

² *Hunt v. Bay State Iron Co.* 97 Mass. 279, per Foster, J., in substantially his language. In this case iron rails were sold to a railroad company under an agreement that they should be laid down on a specified part of the road, but should remain the vendor's property until paid for; and it was held that while the rails continued to be personal property as between the vendor and the company, and also between the vendor and subsequent incumbancers and purchasers of the railroad, having notice of the agreement when they acquired title, they did not remain person-

alty as between the vendor and prior mortgagees of the railroad, or owners of the land over which the railroad was located and the iron was laid, who remain entitled to possession of such land as security for their damages, unless they have consented to such agreement. See *Pierce v. Emery*, 32 N. H. 484; *Haven v. Emery*, 33 N. H. 66; *Southbridge Savings Bank v. Exeter Machine Works*, 127 Mass. 542; *Pierce v. George*, 108 Mass. 78.

³ See cases already cited in this section, and also *Campbell v. Roddy* (N. J.), 14 Atl. Rep. 279; *Docking v. Frenzell*, 34 Kans. 29; 17 Pac. Rep. 160; *Beekman v. Sikes*, 35 Kans. 120.

⁴ *Manwaring v. Jenison*, 61 Mich. 117.

bind existing mortgagees by any arrangement to treat as personalty annexations to the freehold. The legal character of such annexations is determined by the law to be real estate. Mortgagees, as well as other parties in interest, are entitled to the benefit of this rule of law, which can be taken from them only by their own waiver.¹ Thus, a prior mortgage of real estate, which in terms, or as a matter of law, embraces articles of machinery or other fixtures, is not affected by a subsequent mortgage of such articles as chattels.² A mortgage of a farm covers hop poles used upon the land for raising hops, whether they were upon the land when the mortgage was made, or were subsequently put upon it; and the lien of such mortgage is superior to the title acquired by one who, with knowledge of the prior mortgage, and of the mortgagor's insolvency, takes a chattel mortgage upon the poles immediately after their removal from the farm.³

130. Personal property which is incorporated with the realty does not pass by a chattel mortgage as against a subsequent purchaser or mortgagee of the realty. Thus as between a mortgagee of the machinery of a cotton-mill permanently attached to the realty and used with it, and a subsequent mortgagee of the realty, the title of the latter will prevail.⁴ Such permanent fixtures include the machinery for furnishing the motive power of the mill; the steam-engine securely set in its foundation, and its adjuncts, the boilers, together with the shafting, belting, couplings, and pulleys to communicate the power; also the water-wheels and water-wheel governor. They include also the apparatus for furnishing light and warmth to the buildings; the gas-generator, the gas-pump, and the gas-pipes; and also the gas-burners, when adapted expressly to the mill; also the steam-heating pipes, though laid upon hooks, and capable of being removed without disturbing the building, or the hooks holding them; and other heating pipes resting upon the floor without being attached to it.

¹ *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Burnside v. Twitchell*, 43 N. H. 390; and see *Voorhees v. McGinnis*, 48 N. Y. 278.

² *Smith v. Waggoner*, 50 Wis. 155; *S. C.* 6 N. W. Rep. 568; *Frankland v. Moulton*, 5 Wis. 1.

³ *Sullivan v. Toole*, 26 Hun (N. Y.), 203.

⁴ *Smith v. Waggoner*, *supra*; *Pierce v. George*, 108 Mass. 78; *S. C.* 11 Am. Rep. 310, 314. See, *contra*, *Henry v. Von Brandenstein*, 12 Daly (N. Y.), 480. And see *Beckman v. Sikes*, 35 Kans. 120.

They are all part of the system of piping adapted to the building and used with it.¹

Property which has once become real estate, through annexation to the realty, cannot afterwards be made personal property, by the mere agreement of the parties, so as to affect others who may be or may become interested in the realty.²

If such things as an engine and boilers, shafting and gearing, are actually and permanently annexed to the freehold, and are peculiarly adapted to the positions in which they are placed, it does not matter, as regards the question of the legal effect of the annexation, that the owner had no special intent to make these things a part of the freehold. "A man who builds a mill or a house for his own use and occupation, with everything useful and convenient for the purpose, seldom has any special intent that the creation shall be a part of the freehold, or that its auxiliaries shall constitute a part of the freehold. He builds as he wishes, having no reflection as to the legal character of the structure, thinking nothing, and generally knowing nothing, and therefore having no special intent on the subject."³

But machinery of a cotton-mill merely fastened to the floor by nails or screws, or held in position by cleats, to keep it in position, is not part of the realty, and would pass by a chattel mortgage in preference to a subsequent mortgage of the realty. It does not matter that in putting down a new floor it was laid down around the feet and standards of the machines.⁴

Growing crops are so far a part of the realty that upon the entry of a mortgagee of the land, all the crops not severed pass under the mortgage.⁵ But a chattel mortgage of the crops, made by the owner in possession, operates in law as a severance of them, so that they will not pass under a mortgage of the land upon the subsequent entry of the mortgagee and sale of the realty under the mortgage.⁶

¹ *Keeler v. Keeler*, 31 N. J. Eq. 181; *v. Ward*, 14 Mass. 352; *Sturgis v. Warren*, 11 Vt. 433; *Godard v. Gould*, 14 S. C. 8 Am. L. Rec. 670.

² *Docking v. Frazell*, 34 Kans. 29; 17 Barb. (N. Y.) 662; *McEntee v. Scott*, 2 Pac. Rep. 160; *Beckman v. Sikes*, 35 Thomp. & C. (N. Y.) 284.

³ *Voorhees v. McGinnis*, 48 N. Y. 278, *White v. Pulley*, 27 Fed. Rep. 436; *Jones on Mortgages*, § 1658.

⁴ *Keeler v. Keeler*, *supra*; and see *Gale Moore*, 59 Tex. 628.

131. A mortgage of machinery as personal property made after it has been set up, and so affixed to the realty as to become a part of it, although made to the manufacturer contemporaneously with the bill of sale from him to the owner of the land, passes no title to the machinery as against a subsequent purchaser of the real estate, although he purchase with actual knowledge of the mortgage.¹ Evidence of a general usage and custom between manufacturers and purchasers of such property to regard it as personal property is incompetent.² The annexation of the machinery to the freehold, *de facto*, renders it part of the realty; and although the annexation be consented to by the manufacturer under an agreement with the owner of the realty that he would give the former a mortgage of the machinery as personal property, such agreement is inoperative and void as against any one who afterwards acquires title to the realty in fee.

The cases, however, are not in harmony; for while some courts lay special stress upon the matter of intention in determining whether personal articles attached to the realty become fixtures to it, or retain their character as personalty,³ other courts look chiefly to the matter of annexation, and hold that the intention of the parties that the personal chattels shall retain their character of personalty after annexation, or shall change their character to personal property, is one which the law will not carry into effect.⁴

132. If personal property, such as machinery, already subject to a chattel mortgage, be affixed to the realty, with the assent of the mortgagee, it becomes a question whether the chattel mortgage lien is lost as against an existing mortgagee of the realty, or as against subsequent purchasers and mortgagees of the realty, or creditors who subsequently obtain liens upon it. The intention and agreement of the parties has much to do with the determination of the question whether chattels annexed to the realty retain their character as personal property.⁵ But such

¹ Richardson v. Copeland, 6 Gray (Mass.), 536.

² Richardson v. Copeland, *supra*; Keeler v. Keeler, 31 N. J. Eq. 181.

³ Manwaring v. Jenison, 61 Mich. 117.

⁴ Richardson v. Copeland, *supra*. Compare §§ 125 and 127 with 128 and 129.

⁵ Jones on Mortgages, § 429; Tift v. Horton, 53 N. Y. 377; Potter v. Cromwell, 40 N. Y. 287; Sheldon v. Edwards, 35 N. Y. 279; Manwaring v. Jenison, *supra*; Campbell v. Roddy (N. J.), 14 Atl. Rep. 279, 281, per Reed, J.

intention and agreement are subject in a considerable degree to the essential character of the chattels themselves, and to the manner in which they are annexed to the realty. To make effectual an intention that the chattels shall retain their character of personalty, it is essential that they be so annexed that they can be removed without serious damage to the freehold, and without substantially destroying their own qualities or value.¹ The nature of the articles annexed may be such, or the mode of their annexation may be such, that they lose the essential attributes of personal property by annexation itself. "Thus, a house or other building, which, from its size, or the materials of which it was constructed, or the manner in which it was fixed to the land, could not be removed without practically destroying it, would not, I conceive, become a mere chattel by means of any agreement which could be made concerning it. So of the separate materials of a building, and things fixed into the wall, so as to be essential to its support, it is impossible that they should by any arrangement between the owners become chattels."²

An engine and boiler mortgaged to the maker were set up on a foundation, and an engine-house was built over them. The land was already subject to a mortgage. It was held that the mortgagee of the land acquired no title to the engine and boiler as against the mortgagee of these chattels, although it appeared that they could not be removed without some injury to the walls built up about them; for within the limitation before mentioned the chattels could be removed without taking away or destroying that which was essential to the support of the main building, or other part of the real estate to which they were attached, and without destroying or of necessity injuring the chattels themselves.³

Machinery remains personal property until it is actually annexed to the realty, and a chattel mortgage placed upon it before

¹ *Ford v. Cobb*, 20 N. Y. 344; *Tift v. Elmore*, 52 Iowa, 541; *Eaves v. Estes*, 10 Horton, 53 N. Y. 377; *Sisson v. Hibbard*, 10 Hun (N. Y.), 420; *S. C.* 75 N. Y. 542; *Kinsley v. Bailey*, 9 Hun (N. Y.), 452. *Kans.* 314; *Henry v. Von Brandenstein*, 12 Daly (N. Y.), 480.

² *Ford v. Cobb*, 20 N. Y. 344, 351, per Denio, J. See § 124.

³ *Tift v. Horton*, 53 N. Y. 377. For similar cases and a similar decision, see *Sisson v. Hibbard*, *supra*; *Tibbetts v. Moore*, 23 Cal. 208; *First Nat. Bank v.*

See, however, *Frankland v. Moulton*, 5 Wis. 1; *Voorhees v. McGinnis*, 48 N. Y. 278, where the things annexed were regarded as permanent improvements of the land, and as having been intended as such by the owner who annexed them.

it is attached to the realty is superior to a vendor's lien reserved upon the land for purchase money.¹

Much less could a mortgagee of the realty claim such a fixture when his mortgage expressly excepts the fixture from its operation.²

Salt-kettles, which were mortgaged to the seller as personalty at the time of the purchase, were taken by the purchaser to his salt-works and embedded in brick arches in such a way that they could be removed without injury by displacing a portion of the brick work at an inconsiderable expense; and the course of the manufacture required them to be so removed and reset annually. There was no evidence of an agreement that they should remain personalty, except such as was furnished by the mortgage itself and the circumstances attending its execution. The mortgage was held good as against a subsequent purchaser of the salt-works, who had no notice of the facts other than that derived from the filing of the chattel mortgage.³

133. The purpose of the annexation as well as the mode of it determines the character of the property annexed.⁴ "The same mode may exist, and yet the property be personal in the one case and real in the other. For example: trees growing in a nursery are annexed to the soil in the same way as trees growing in an orchard. But in the former case they are cultivated for the purpose of trade, in the latter as a permanent accession to the land. The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried on in or upon the premises, and the premises or *locus in quo*. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient. But articles which have been an-

¹ Miller v. Wilson, 71 Iowa, 610. In this case the owner of mill property, subject to a lien for purchase money, purchased an engine and machinery to be annexed to the mill, and the machinery had been delivered on the ground, and he owner intended to annex it to the realty, and had begun to erect a building

in which to place it, though none of it was in place, when he executed a chattel mortgage of the machinery.

² Badger v. Batavia Paper M'fg Co. 70 Ill. 302.

³ Ford v. Cobb, 20 N. Y. 344.

⁴ Fortman v. Goepper, 14 Ohio St. 558, 567.

nexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business, which may be of a temporary duration, become subservient to the realty, and acquire and retain its legal character. As, however, the combined use or operation of both the real and personal property is necessary for the business, the difficulty in any given case consists in determining on which side of the dividing line to assign the particular article in question. This must in a great degree be determined by the circumstances of each particular case.”¹

133 a. The effect of the agreement of the parties as regards the character of annexations to the realty is different, as against existing mortgages of the realty, from its effect as against subsequent mortgagees or purchasers of the realty. This distinction is fully illustrated in a recent important decision in New Jersey, where a vendor of an engine boiler and machinery, knowing that they were to be annexed to the purchaser's realty, took a chattel mortgage from him for a part of the price, but failed to register it. The purchaser afterwards annexed these chattels to the real estate upon which he had already given a mortgage. It was held that the lien of the chattel mortgage should be protected so far as it could be without diminishing the security which the mortgagee of the real estate would have had if the annexation had not been made.² The court say that the mortgagee of chattels, who consents to have them transmuted into a shape by which subsequent purchasers and mortgagees are liable to be subjected to deceptive dealings, seems to have no equitable ground upon which his lien should be recognized as against *bonâ fide* subsequent purchasers and mortgagees for value. “The entire spirit of our registry acts is opposed to the notion that, in such a juncture of affairs, the real estate purchaser would not be regarded as a *bonâ fide* purchaser against whom the chattel mortgage would be void.” But as to a mortgagee of the real estate whose lien exists at the time the chattels are attached to the realty, such chattels would become subject to the lien of the real estate mortgage unless the chattel mortgage intervenes. Any

¹ Fortman v. Goepper, 14 Ohio St. 558, ² Campbell v. Roddy (N. J.), 14 Atl. 567, per White, J. And see Duffus v. Rep. 279. Bangs, 43 Hun (N. Y.), 52.

property belonging to the mortgagor which he might choose to annex to the mortgaged premises would become realty. "But it is difficult to perceive," continue the court, "any equitable ground upon which the property of another which the mortgagor annexes to the mortgaged premises should inure to the benefit of a prior mortgage of the realty. The real estate mortgagee had no assurance, at the time he took his mortgage, that there would be any accession to the mortgaged property. He may have believed that there would be such an accession; but he obtained no rights, by the terms of his mortgage, to a lien upon anything but the property as it was conditioned at the time of its execution. He could not compel the mortgagee to add anything to it. So long, therefore, as he is secured the full amount of the indemnity which he had taken, he has no ground for complaint. There is, therefore, no inequity towards the prior real estate mortgagee, and there is equity towards the mortgagee of the chattels, in protecting the lien of the latter to the full extent, so far as it will not diminish the security of the former. As already remarked, the real estate mortgagee is entitled to any annexation made by his mortgagor of his own property, but is not entitled to the property of others. The property of the mortgagor in these chattels, when he made the annexation, was an equity of redemption. So far as this interest had a value, it became subjected to the lien of the prior real estate mortgage, but the value of his interest was the value of the property subjected to the lien."¹

¹ As remarked by Reed, J., in delivering the foregoing opinion, an analogous rule has been established as regards after-acquired property of railroads subject to mortgages of their roads and franchises; namely, that the mortgages attach to such property in the condition in which it comes to the mortgagor's hands. *United States v. Railroad*, 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 235. "It is true that in the opinions in these cases there is a statement that the rule would be different if the articles upon which the lien existed became incorporated in the road itself. Instances may be imagined where the latter would be a proper rule. Where the articles are of such a character that their detachment would involve a destruction of or a dismantling of an important

feature of the realty, such annexation might well be regarded as an abandonment of the lien by him who impliedly assented to the annexation. Shingles, lumber, brick, to be used in a building, railroad iron or ties to be used in constructing a railroad, are apparent samples of such a class of chattels. I am not prepared to say, however, that even in such instances there may not be an equitable method of awarding to a prior mortgagee of the realty all his rights, and yet preserving in some degree the interest of the lienor of the chattels; for my view of the effect to be given to the annexation of chattels, which the chattel mortgagee or lienor must have known were destined to become a part of real property, is to preserve the right of the prior real estate mortgagee

134. As regards the effect of notice of a prior chattel mortgage given to purchasers and mortgagees and creditors subsequently obtaining liens upon the realty, it is clear that if they acquire such title or lien with actual knowledge of the mortgage claim upon the fixtures, their title or lien is subject to such mortgage.¹ But whether the record of the chattel mortgage is effectual to protect the mortgagee as against such subsequent purchasers, mortgagees, and creditors, is a question of more difficulty, and one upon which there is some conflict of authority. On the one hand, it is said that the constructive notice imparted by the record of such mortgage before the chattels were affixed is as effectual to protect the mortgagee as actual notice would be.² On the other hand, it is declared that, when personal chattels become affixed to the realty with the mortgagee's consent and coöperation, they become at once *de facto*, by operation of law, part and parcel of the land, and necessarily lose their chattel character, so that they could not be replevied as chattels, but would pass to a purchaser of the land of which they visibly constituted a part. The mortgagee having consented to the conversion of this personal property into real property, his right to claim it under his mortgage ceased at the precise moment of time when by his consent it ceased to be chattels and became realty. The record then ceased to be constructive notice of the mortgage lien.³ And the better opinion is, that a purchaser of the realty is bound only to take notice of the record title of the realty, and is not in any way bound to examine the records for chattel mortgages, for he is not affected by the record of a chattel mortgage upon fixtures of such realty.⁴

A mortgage of real estate including factories and shops, together with the engines, machinery, and other personal chattels which are fixtures when attached to the realty, need not be registered as a chattel mortgage when it is the intention of the parties, as shown

in the same degree of security which he would have enjoyed had the property remained as when mortgaged." Per Reed, J.

That a mortgage of after-acquired property operates only by equitable estoppel, and only against the mortgagor and his privies in contract, and attaches to such property only in the condition in which it comes into the mortgagor's possession, that is, subject to the liens then existing

upon it, see, also, *Hall v. Mullanphy Planing Mill Co.* 16 Mo. App. 454.

¹ *Simons v. Pierce*, 16 Ohio St. 215.

² *Sowden v. Craig*, 26 Iowa, 156; *Sword v. Low* (Ill.), 13 N. E. Rep. 826.

³ *Sowden v. Craig*, 26 Iowa, 156, 165, per Dillon, C. J., dissenting from the decision of the court.

⁴ *Richardson v. Copeland*, 6 Gray (Mass.), 536; *Bringhoff v. Munzenmaier*, 20 Iowa, 513. See § 127.

by the terms of the instrument, that such chattels should pass with the freehold as part and parcel of it.¹

135. Actual severance of fixtures from the land, or actual notice of a binding agreement to sever, is necessary to render a prior mortgage of the fixtures valid against a subsequent purchaser of the realty. Thus, where a mortgage was made of the boilers, engines, saws, and gearing of a steam saw-mill before these articles were annexed to the realty, with power in the mortgagee to take possession of them upon default, whether they should have been attached to the realty, and should have become a part of it, or not, and subsequently a mortgage was made of the realty to one who had no actual notice of this agreement, it was held that the chattel mortgage, though duly recorded, was inoperative as against the mortgage of the realty.² The court say:³ "The right given to the plaintiffs by the mortgage, to enter upon the premises and sever the property, would doubtless have been effectual as between the parties. But the defendants were purchasers without notice of this agreement. The filing of chattel mortgages is made constructive notice only of incumbrances upon goods and chattels. The defendants purchased and took a conveyance of real estate, of which the property now in question was in law a part; and, in our opinion, it devolved upon the plaintiffs, who sought to change the legal character of the property and create incumbrances upon it, either to pursue the mode prescribed by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance, or otherwise take the risk of its loss in case it should be sold and conveyed as part of the real estate to a purchaser without notice."

136. Appurtenances. — Under a chattel mortgage of "one frame grain elevator warehouse, with all the appurtenances thereto belonging," the mortgagee claimed title to an engine-house situated more than fifty feet distant from the warehouse, together with the engine and boiler therein, and also claimed an office building, still farther away, with a stationary Fairbanks scale.

¹ Potts v. N. J. Arms & Ordnance Co. St. 558, 565; Beckman v. Sikes, 35 Kans. 17 N. J. Eq. 395. 120. See, however, § 127.

² Brennan v. Whitaker, 15 Ohio St. 446. See Fortman v. Goepper, 14 Ohio 446. ³ Brennan v. Whitaker, *supra*, per White, J.

It was held as a matter of law that the property in question could not be regarded as appurtenant to the warehouse, nor did it pass under the general term of "appurtenances." This term is commonly understood in law to include only hereditaments which are purely incorporeal, and which are usually annexed to lands or houses. The word may be used in a more comprehensive sense, and when the proof shows that it was so used, effect should be given to the intent of the parties. But if there be no ambiguity in the description, parol evidence is not admissible to show what was in fact conveyed.¹

137. A mortgage of fixtures as against the mortgagor's assignee in bankruptcy is a valid lien, although as against a prior mortgagee of the realty the fixtures would be real estate. If there be a prior mortgage of the land, and the prior mortgagee make no claim to the fixtures, or his mortgage be fully satisfied out of the land without resorting to the fixtures, the mortgagee of the fixtures has a valid security upon them.² Judge Lowell, delivering a decision to this effect, said: "It is argued on behalf of the assignees, that a contract to treat fixtures as chattels, whether it be express or implied, must be made before they are actually affixed to the realty. And for this some remarks of Dewey, J., delivering the opinion of the court in *Gibbs v. Esty*,³ are quoted. But those remarks appear to be intended only for parol agreements concerning buildings and fixtures annexed by a stranger, and to mean that such a parol agreement or license cannot change real into personal estate after its character has been once established. So, if the question here were between the petitioner and the savings bank (the mortgagee of the land), no mere oral license of the latter, given after the engines were set up, could be shown. Growing wood or crops may be sold by parol, with a parol license to sever them; and I am much inclined to think that trade fixtures might be. At all events, there can be no doubt that the owner can, in writing, and for a valuable consideration, convey severable chattels in such a way as to bind himself and his assignee in bankruptcy by estoppel at least."

¹ *Frey v. Drahos*, 6 Neb. 1.

³ 15 Gray (Mass.), 587.

² *Ex parte Ames*, 1 Lowell, 561, 567.

CHAPTER IV.

MORTGAGES OF FUTURE PERSONAL PROPERTY.

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| I. At law, 138-157. | | III. In equity, 170-175. |
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158-169. | | |

I. *At Law.*

138. At common law, a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence and belonging to him.

A mortgage of goods which the mortgagor does not own at the time of making the mortgage, though he may afterwards acquire them, is void in respect to such goods as against subsequent purchasers or attaching creditors.¹ Thus, if a mortgage be made of

¹ **Massachusetts:** *Jones v. Richardson*, 10 Met. 481, a leading case on this point; *Codman v. Freeman*, 3 Cush. 306; *Chesley v. Josselyn*, 7 Gray, 489; *Bonsey v. Amee*, 8 Pick. 236. **New York:** *Farmers' Loan & Trust Co. v. Long Beach Imp. Co.* 27 Hun, 89; *Gardner v. McEwen*, 19 N. Y. 123; *Otis v. Sill*, 8 Barb. 102. **Maine:** *Chapin v. Cram*, 40 Me. 561; *Griffith v. Douglass*, 73 Me. 532; *S. C.* 14 Rep. 494; *Head v. Goodwin*, 37 Me. 181. **Illinois:** *Hunt v. Bullock*, 23 Ill. 320; *Roy v. Goings*, 6 Bradw. 162; *S. C.* 96 Ill. 361. **Maryland:** *Wilson v. Wilson*, 37 Md. 1; *Hamilton v. Rogers*, 8 Md. 301; *Rose v. Bevan*, 10 Md. 466. **Other Cases:** *Wagner v. Watts*, 2 Cranch C. C. 169; *Letourno v. Ringgold*, 3 Cranch C. C. 103; *Pierce v. Emery*, 32 N. H. 484, 505; *Looker v. Peekwell*, 38 N. J. L. 253; *Hunter v. Bosworth*, 43 Wis. 583; *Comstock v. Scales*, 7 Wis. 159; *Chapman*

v. Weimer, 4 Ohio Stat. 481; *Williams v. Briggs*, 11 R. I. 476; *Cook v. Corthell*, Ib. 482; *Parker v. Jacobs*, 14 S. C. 112; *Wilson v. Seibert*, 8 Am. L. Reg. (N. S.) 608. In **Georgia** it is provided by statute that a mortgage may cover a stock of goods or other things in bulk, but changing in specifics; in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches on purchases made to supply their place. Code 1873, and Code 1882, § 1954. But such a mortgage can only cover an amount of goods equal to that on hand at the time the mortgage was made. *Chisolm v. Chittenden*, 45 Ga. 213. To that extent the subsequent purchases are covered, although these be made on credit and remain unpaid for; but of course it does not cover goods brought into the stock already subject to some other lien, or owned by another person; and it does

a stock in trade, it will not at law cover additions afterwards made to the stock, though it be expressly framed to cover additions to the stock intended to be made to replace such as should be sold.¹ Such a mortgage is, as to such property, only a contract to assign it to the mortgagee, and confers only an equitable title.² This is everywhere conceded to be the general rule at law.³ But even when void as against creditors and subsequent purchasers, such a mortgage is valid as between the parties thereto,⁴ and as to others who stand in the same or no better position.⁵

In those jurisdictions where the two systems of remedial justice called law and equity are blended by a code and administered in a single court of original jurisdiction, the rule of the courts of law is so far recognized that it is conceded that a mortgage of after-acquired chattels will not, before the mortgagee or trustee has taken possession, operate to prevent such chattels from being levied on under execution at law.⁶

Yet in South Carolina, where the distinction between actions at law and suits in equity has been abolished, it is held that a mortgagee of after-acquired property can enforce his equitable rights under a form of action which seeks a relief which was formerly obtainable only in a court of law; and that such a mort-

not cover goods added to their stock by a new firm which has purchased the original stock, although the mortgagor remains a member of that firm. *Anderson v. Howard*, 49 Ga. 313; *Goodrich v. Williams*, 50 Ga. 425; *Johnson v. Patterson*, 2 Woods, 443.

¹ *Barnard v. Eaton*, 2 Cush. (Mass.) 294.

² *Joseph v. Lyons*, 15 Q. B. D. 280; 33 Am. L. Reg. 298, and note by E. H. Bennett.

³ *Wright v. Bircher*, 5 Mo. App. 322, 327; *Griffith v. Douglass*, 73 Me. 532; *Parker v. Jacobs*, 14 S. C. 112; *France v. Thomas*, 86 Mo. 80. But if property not belonging to the mortgagor be in the mortgagee's possession, and be included in the mortgage at the owner's request, the mortgage is effectual as to such property, as against the mortgagor and as against the owner. *Berghoff v. McDonald*, 87 Ind. 549.

⁴ *Ludwig v. Kipp*, 20 Hun (N. Y.), 265.

⁵ *Wisner v. Ocumpaugh*, 71 N. Y. 113; *Reynolds v. Ellis*, 103 N. Y. 115, affirming *S. C.* 34 Hun, 47; *Nestell v. Hewitt*, 19 Abb. N. C. (N. Y.) 282.

⁶ *Farmers' Loan & Trust Co. v. Long Beach Imp. Co.* 27 Hun (N. Y.), 89; *Thompson v. Foerstel*, 10 Mo. App. 290. In the latter case Judge Thompson, whose language is in part adopted in the text, further says: "Now when we say that a certain contract, though void at law, is good in equity, what do we mean where, as in Missouri, two remedial systems, known respectively as law and equity, are blended together as one system, administered in one court, and in but one form of action? I apprehend that we mean that if a contract would be upheld under either of those remedial systems, it will be upheld by the law of Missouri in a proper proceeding."

gagee, though he has not taken possession of the property, is entitled to it as against a creditor of the mortgagor who has levied an execution upon it.¹

139. The general rule holds good even where a mortgage is made to secure the purchase money of goods, a part of which the mortgagee has not at the time delivered to the mortgagor. The property does not vest in the mortgagor till it is delivered to him, and the mortgage is not rendered valid, as respects the property not then delivered, by the subsequent completion of the delivery, as against attachments made still later by the creditors of the purchaser. As regards such after-acquired property, the mortgage is no better than any mortgage of property afterwards acquired by the mortgagor.²

But if a purchaser of merchandise mortgages it in order to pay the vendor, and the mortgage is given, payment made, and the goods delivered on the same day, as parts of one transaction, the mortgage will not be regarded as given on after-acquired property, but as a present mortgage in terms and effect.³

140. One may make a valid mortgage of a thing in which he has a potential interest at the time. Thus, to use illustrations familiar since the time of Chief Justice Hobart,⁴ "Land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the tithe-wool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that he shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially." If he owns land, he may mortgage the crops to grow upon it;⁵ or if he owns sheep, he may mortgage the wool to grow upon them. Having a present

¹ *Parker v. Jacobs*, 14 S. C. 112.

² *Pettis v. Kellogg*, 7 Cush. (Mass.) 456.

³ *Greenaway v. Fuller*, 47 Mich. 557.

⁴ *Grantham v. Hawley*, Hob. 132.

⁵ *Cayce v. Stovall*, 50 Miss. 396; *White v. Thomas*, 52 Miss. 49; *Thrash v. Bennett*, 57 Ala. 156; *Stearns v. Gafford*, 56 Ala. 544; *Jones v. Webster*, 48 Ala. 109;

Butler v. Hill, 1 Bax. (Tenn.) 375; *Stephens v. Tucker*, 55 Ga. 543; *S. C.* 58 Ga. 391; *Cook v. Steel*, 42 Texas, 53; *McGee v. Fitzer*, 37 Texas, 27; *Moore v. Byrum*, 10 S. C. 452; *Mayer v. Taylor*, 69 Ala. 403; *Kimball v. Sattley*, 55 Vt. 285, 290, per Veazey, J. *Contra* in *Nebraska*: *Cole v. Kerr*, 19 Neb. 553.

ownership of the land and the sheep, he has a present vested right to the product, growth, or increase of the property whenever it shall come into existence. He may, therefore, sell or mortgage the natural and expected product, growth, or increase of his own property; but he cannot sell or mortgage the crops to grow upon the land of another, or the wool to grow upon another's sheep, or upon sheep that he may buy thereafter.¹ And so the owner or lessee of a chattel, such as a steamboat, may mortgage the profits or income expected to arise out of the use of it.² But a mere possibility or expectancy of acquiring property, without any present interest in it, is not the subject of a sale or mortgage.³ A mortgage of future crops to be grown on rented lands of which the mortgagor has not, at the time of giving it, acquired possession under his lease, is invalid at law unless ratified by some act on the part of the mortgagor after acquiring possession, though such a mortgage may be good in equity.⁴ A fisherman may expect to catch fish, but while they are in the sea uncaught he cannot make a valid sale or mortgage of them. The fact that he owns a fishing schooner, and is about to proceed upon a fishing voyage, gives him no potential interest in the fish he may possibly catch. He has no actual or potential interest in the fish, and his sale or mortgage of them passes no interest in such fish as he may afterwards catch.⁵ An assignment of the freight, earnings, and profits of a ship fitted out for the whale-fishery gives no claim at law to the oil obtained in a subsequent voyage of the ship,—the produce of whales taken in such voyage.⁶ Lord Ellenborough, C. J., said: "The oil had no existence, actual or potential, at the time this deed was made. Here, at the time of this assignment, the assignors had no property, actual or potential, in this oil; it was altogether matter of chance whether any of it would have been obtained; and even the voyage in which it was obtained does not appear to have been in contemplation."⁷

The owner of a farm who has leased it for a year under an oral agreement whereby the lessee is to "carry on the farm at the

¹ *Grantham v. Hawley*, Hob. 132.

² *Stewart v. Fry*, 3 Ala. 573. See, also, *Floyd v. Morrow*, 26 Ala. 353.

³ *Skipper v. Stokes*, 42 Ala. 255; *Purcell v. Mather*, 35 Ala. 570.

⁴ *Booker v. Jones*, 55 Ala. 266; *Kirksey v. Means*, 42 Ala. 426.

⁵ *Low v. Pew*, 108 Mass. 347. See, however, *Jones v. Webster*, 48 Ala. 109, 112, per Saffold, J.

⁶ *Robinson v. Mædonnell*, 5 Mau. & Sel. 228. And see *Curtis v. Auber*, 1 Jac. & W. 526.

⁷ But otherwise in equity. See *infra*.

halves," and is to leave at the end of the term as much hay as he found there at the beginning, the owner not occupying the farm during the year, has not, as a matter of law, such a potential interest in the crops as to enable him to mortgage them. "Whether he has any potential interest depends on the contract, which must be ascertained by the jury. If the contract is, that the specific products are to belong to the parties jointly, and are to be divided, he has such potential interest; if the contract is that the lessee is to pay, as rent, a share of the crops or its equivalent, he would have no interest in any specific property so that he could sell it, though he has a claim for rent payable at the stipulated time."¹

141. A lessee of land has a sufficient interest in it to enable him to execute a valid mortgage of the crops to be grown upon the land during the whole term of the lease.² Such a mortgage, duly recorded, is superior to a mortgage of a crop grown upon such land within the term of the lease, though executed after the crop had been gathered.³ Such a mortgage is also superior to a mortgage of crops made by a sub-lessee of a portion of such land. Thus, the owner of a plantation having leased it, and taken a mortgage from the lessee upon a cotton crop to be raised upon the land, the latter leased a portion of it for four bales of cotton, and the sub-lessee mortgaged for supplies the crop to be

¹ *Orcutt v. Moore*, 134 Mass. 48.

² *Petch v. Tuttin*, 15 Mee. & W. 110; *S. C.* 15 L. J. Ex. 280. **New York**: *Nestell v. Hewitt*, 19 Abb. N. C. 282; *Andrew v. Newcomb*, 32 N. Y. 417, 421, per Denio, C. J. "Crops to be raised are an exception to the general rule that title to property not in existence cannot be affected so as to vest the title when it comes into being. In the case of crops to be sown it vests potentially from the time of the executory bargain, and actually as soon as the subject arises." See, also, *Hamilton v. Austin*, 36 Hun (N. Y.), 138; *Nestell v. Hewitt*, *supra*. **Vermont**: *Smith v. Atkins*, 18 Vt. 461, 465. **California**: *Arques v. Wasson*, 51 Cal. 620; *Quiriauque v. Dennis*, 24 Cal. 154. **Mississippi**: *Everman v. Robb*, 52 Miss. 653; *Sillers v. Lester*, 48 Miss. 513. **Alabama**: *Booker*

v. Jones, 55 Ala. 266; *Jones v. Webster*, 48 Ala. 109; *Thrash v. Bennett*, 57 Ala. 156; *Stearns v. Gafford*, 56 Ala. 544; *Brown v. Coats*, *Ib.* 539; *Adams v. Tanner*, 5 Ala. 740; *Robinson v. Mauldin*, 11 Ala. 977; *Mauldin v. Armistead*, 14 Ala. 702; *S. C.* 18 Ala. 500. **Arkansas**: *Robinson v. Kruse*, 29 Ark. 575. **Indiana**: *Headrick v. Brattain*, 63 Ind. 438. **Iowa**: *Fejavy v. Broesch*, 52 Iowa, 88; *Pennington v. Jones*, 57 Iowa, 37.

In the later English cases, however, no distinction in principle seems to have been observed between mortgages of after-grown crops and other after-acquired property. See *Gale v. Burnell*, 7 Q. B. 850; *Hope v. Hayley*, 5 El. & Bl. 830; *Congreve v. Evetts*, 10 Exch. 298.

³ *Everman v. Robb*, 52 Miss. 653.

raised by him. It was held that the entire plantation was subject to the burden of the rent secured by the lessee's mortgage, and that the sub-lessee took his lease of a portion of the plantation subject to the burden of a proportional part of the rent and no more.¹ It is to be observed, however, that some of the cases in which it is held that a lessor may effectually reserve a lien upon the crops to be raised by the lessee during the term are decided upon the ground that the contract takes effect by way of reservation, and that the crops thus reserved remain the property of the landlord,² and that upon this principle a mortgage made by the lessee to the lessor at the time of the lease, of the crops to be raised during the term, may be considered, together with the lease, as part of one instrument, operating as a "lease and reservation."³

A mortgage of a growing crop by a tenant who has planted under an agreement with his landlord, that the latter shall have a portion of the crop, is subject to such agreement with the landlord. The mortgagee succeeds to the contract of his mortgagor, and to the interest which the mortgagor had under the contract.⁴

Where a farm is leased under an agreement that the rent is to be paid by a share of the crops, and that the hay is to be spent on the farm, a mortgage by the tenant of his share of the hay creates no lien such as entitles the mortgagee to remove it. His interest in the hay is limited to the right of consuming it upon the farm, and this is the only right he could convey by the mortgage.⁵

142. A valid mortgage may be made of part of a growing crop, if such part be so described as to be capable of identification. Thus, a mortgage made in May of six bales of cotton to be produced on a designated plantation cultivated by the mortgagor, such bales to be of a certain weight, to be covered with bagging secured with iron ties, and delivered at a certain warehouse on or before the fifteenth day of October following, is sufficiently specific in the description of the property, and the mortgagee may

¹ *Harris v. Frank*, 52 Miss. 155. And see *Jones v. Webster*, 48 Ala. 109.

² *Smith v. Atkins*, 18 Vt. 461; *Bellows v. Wells*, 36 Vt. 599; *Moulton v. Robin-*

son, 27 N. H. 550; *Lewis v. Lyman*, 22 Pick. (Mass.) 437.

³ *Booker v. Jones*, 55 Ala. 266.

⁴ *Sunol v. Molloy*, 63 Cal. 369.

⁵ *Jewell v. Woodman*, 59 N. H. 520.

prove that the mortgagor severed such cotton from the rest of the crop and delivered it at the warehouse according to his promise.¹ If security be given upon a portion of a crop to be selected by the creditor, he does not acquire any lien upon any specific portion of it until he has made his selection.² An instrument purporting to be a mortgage, whereby a planter binds himself to deliver at maturity of his cotton-crop so much of it as will be necessary to pay a certain sum advanced, is merely an executory agreement to deliver enough cotton to pay the debt; but no particular cotton being described, it does not create a lien upon any part of the crop, but only affords a remedy in damages for failure to deliver the cotton.³ And so a mortgage of so much cotton as will make two bales, each of a certain weight, is void, because no definite part of the crop is mortgaged.⁴ But such a mortgage would be valid if the cotton were described as the first picking of the crop for the year.⁵

A mortgage of an undivided interest in a growing crop need not designate in what manner the division of the crop is to be made, if the whole crop be properly described.⁶

Whether a lessor of land let on shares has such a potential interest in the products that he can mortgage them, is a question that must depend upon the special terms of the contract, upon the subject matter, and the surrounding circumstances in the light of which it is to be interpreted, the question being what was the intention of the parties to the lease. When the letting is oral, and not capable of being exactly proved, it must be left to the jury to determine what the contract is, and what relation the parties sustain to each other.⁷

143. Even a mortgage of an unplanted crop, or of future products of a farm, made by one in possession of land, as owner or lessee, is generally regarded as valid at law.⁸ Thus, the

¹ *Stephens v. Tucker*, 55 Ga. 543. "If a man have five horses in his stable, and he giveth unto me one of his horses in his stable, now I shall take which of the horses I will." Perkins's Profitable Book, pl. 74.

² *Prentice v. Nutter*, 25 Minn. 485.

³ *Thurman v. Jenkins*, 2 Bax. (Tenn.) 426.

⁴ *Williamson v. Steele*, 3 Lea (Tenn.), 527; *Rountree v. Britt*, 94 N. C. 104.

⁵ *Senter v. Mitchell*, 5 McCrary, 147; 16 Fed. Rep. 206.

⁶ *Sims v. Mead*, 29 Kans. 124.

⁷ *Orcutt v. Moore*, 134 Mass. 48; *S. C.* 15 Rep. 336.

⁸ *New York: Van Hoozer v. Cory*, 34 Barb. 9, 12; *Conderman v. Smith*, 41

owner of a dairy-farm, who had leased it, with the cows, for a term of two years, reserving a lien upon the products of the farm

Barb. 404; Wood v. Lester, 29 Barb. 145; Nestell v. Hewitt, 19 Abb. N. C. 282; Andrew v. Newcomb, 32 N. Y. 417. California: Arques v. Wasson, 51 Cal. 620. North Carolina: Robinson v. Ezzell, 72 N. C. 231; Cotten v. Willoughby, 83 N. C. 75; Womble v. Leach, 83 N. C. 84; Harris v. Jones, 83 N. C. 317; Rawlings v. Hunt, 90 N. C. 270; Rountree v. Britt, 94 N. C. 104; Atkinson v. Graves, 91 N. C. 99. Tennessee: Watkins v. Wyatt, 9 Bax. 250. Iowa: Wheeler v. Becker, 68 Iowa, 723; 28 N. W. Rep. 40; Scharfenburg v. Bishop, 35 Iowa, 60; Brown v. Allen, Ib. 306. Minnesota: Miller v. McCormick Harvesting Machine Co. 35 Minn. 399; Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193; 20 N. W. Rep. 85. Mississippi: Black v. Robinson, 61 Miss. 54.

See, however, McCaffrey v. Woodin, 65 N. Y. 459, holding a lessee's mortgage of future crops good in equity; and Cressey v. Sabre, 17 Hun (N. Y.), 120, holding a mortgage upon a crop not planted invalid at law against a purchaser of the crop after it was gathered. The justice delivering the decision in the latter case attempted to distinguish cases arising upon covenants in leases, that the lessor shall have the crops to be grown upon rented lands as security for unpaid rent, as not really being mortgages. But see McCaffrey v. Woodin, *supra*, to the contrary.

But a landlord's lien on the crop for rent is superior to that of a mortgagee. Watson v. Johnson, 33 Ark. 737; Lambeth v. Ponder, 33 Ark. 707; Tomlinson v. Greenfield, 31 Ark. 557, 558; Franklin v. Meyer, 36 Ark. 96; Stern v. Simpson, 62 Ala. 194.

In Alabama a mortgage, whether verbal or written, of a crop which has not yet been planted, though valid between the parties, does not convey a legal title on which the mortgagee, before taking possession of the crop, can maintain detinue or trover against a third person. Collier v. Faulk, 14 Rep. 237; Elmore v. Simon,

67 Ala. 526; Rees v. Coats, 65 Ala. 256 declaring erroneous a *dictum* to the contrary in Brown v. Coats, 56 Ala. 439. But he may maintain a special action on the case. Rees v. Coats, *supra*; Hamilton v. Maas, 77 Ala. 283; Smith v. Fields, 79 Ala. 335; Whittleshoffer v. Strauss (Ala.), 3 So. Rep. 524. Although a mortgage of an unplanted crop is a mere executory contract or equitable lien, yet if the mortgagor, after the crop has matured, delivers it to the mortgagee in execution of the contract, he is thereby clothed with the legal title as fully as if the crop had been in existence at the execution of the mortgage, and such title will prevail over that of an intermediate mortgagee. Stern v. Simpson, 62 Ala. 194; Columbus Iron Works Co. v. Renfro, 71 Ala. 577; Mayer v. Taylor, 69 Ala. 403; Seay v. McCormick, 68 Ala. 549; Varnum v. The State, 78 Ala. 28. See § 174: Burns v. Campbell, 71 Ala. 271; Hurst v. Bell, 72 Ala. 336; Marks v. Robinson, 82 Ala. 69; S. C. 2 So. Rep. 292; Whittleshoffer v. Strauss, *supra*.

In Arkansas a mortgage of an unplanted crop was formerly considered invalid at law though good in equity. Tomlinson v. Greenfield, 31 Ark. 557; Apperson v. Moore, 30 Ark. 56. But since the passage of the Act of Feb. 11, 1875 (Acts 1874-75, p. 149), such a mortgage is good at law. That act provides that mortgages of crops planted or to be planted shall have the same force and effect as mortgages of property already in being. Dig. of Stats. 1884, § 4747; Lambeth v. Ponder, 33 Ark. 707; Senter v. Mitchell, 5 McCrary, 147.

In New Mexico Territory a mortgage of growing crops before the same are matured and gathered is declared to be null and void and of no effect. Comp. Laws 1884, § 1586.

In California the lien of a mortgage on growing crops continues after severance, whether remaining in its original state or converted into another product, so long as

as security for the rent, in an action at law against an officer who had levied upon cheese, the product of the farm during the second year of the lease, was held entitled to recover, because the cheese which the lessee expected to make from the cows was properly the subject of a grant, potentially in existence and within the power of the grantor as much as the wool that might be grown on the grantor's sheep, or the future young of his animals, or the wine that might be made from his vineyard, or the corn that might grow upon his land.¹ Cases in which there is no absolute grant of future crops, but only a right to enter and hold the crops for the rent of the land, are to be carefully distinguished from the above.² In the latter class of cases, the contract gives the lessor no rights against subsequent purchasers and creditors of the lessee until the former takes possession. Until delivery of the crops to the lessor, or possession taken by him, in payment of the rent, they remain the property of the lessee. Such a clause is an executory contract or license to dispose of the crops, and not a sale or mortgage of them.²

The principle underlying all these cases is that the right to the property, when it shall come into actual existence, is a present

the same remains on the land of the mortgagor. Codes and Stats., Supp. 1880, § 7972; Civ. Code, § 2972. The lien is lost when the gathered crop is removed from the mortgagor's land. *Waterman v. Green*, 59 Cal. 142.

In *Minnesota* the mortgaging of crops before the seed thereof shall have been sown or planted, for more than one year in advance, is forbidden, and all securities or mortgages hereafter executed on such crops are declared void and of no effect; but this prohibition shall not apply to mortgages given upon crops to secure part or all of the purchase price of lands upon which said crops may be sown or planted. Gen. Laws 1887, ch. 176.

Nevada. A chattel mortgage upon a growing crop may be executed as well before as after the crop is planted, and when executed before the crop is planted, it shall be expressed in the mortgage that it is the intention of the parties that the same shall take effect upon the crops when planted. Stats. 1887, ch. 57.

¹ There are various decisions and *dicta* in earlier cases, to the effect that a chattel mortgage can only operate on property in actual existence at the time of its execution, and cannot cover future products of the land if given a single day before they come into existence; but these decisions may be considered as now superseded by the general adoption of the principles above stated. As in *Redd v. Burrus*, 58 Ga. 574; *Comstock v. Scales*, 7 Wis. 159; *Bank of Lansingburgh v. Crary*, 1 Barb. (N. Y.) 542, 551, per Paige, J.; *Milliman v. Neher*, 20 Barb. (N. Y.) 37; *Stowell v. Bair*, 5 Bradw. (Ill.) 104. A crop cannot be mortgaged before it is sown. *Hutchinson v. Ford*, 9 Bush (Ky.), 318.

² *Butterfield v. Baker*, 5 Pick. (Mass) 522; *Munsell v. Carew*, 2 Cush. (Mass.) 50. And see *Lewis v. Lyman*, 22 Pick. (Mass.) 437.

² *Munsell v. Carew*, *supra*; *Milliman v. Neher*, 20 Barb. (N. Y.) 37, per Boeckes, J.; *Buskirk v. Cleveland*, 41 Barb. (N. Y.) 610.

vested right, such that the mortgagor at the time of the execution of the mortgage has possession of the future property, or an interest in the agent that is to produce it.¹

144. At law there can be no valid assignment of future wages or earnings, except the assignor has a potential interest therein by virtue of a present contract whereby such wages or earnings are to accrue to him. Without such a contract the future wages are a mere possibility, coupled with no present interest in the assignor; while if the assignor has such a contract, the possibility of obtaining such future earnings, though contingent and liable to be defeated, is coupled with an interest, and is a vested right.² And so a seaman who is entitled under shipping articles to a lay or share in the profits of a whaling voyage, in lieu of wages, may make a valid assignment thereof. The thing assigned is not, however, any part of the oil to be made, but is the debt which will become due to him at the end of the voyage.³ But he could not make a valid assignment of earnings of a voyage not begun or contemplated, or in any way defined by contract.⁴

145. Whether a valid chattel mortgage can be made of growing trees, fruit, and grass, is a question which involves

¹ *Farmers' Loan & Trust Co. v. Long Beach Improvement Co.* 27 Hun (N. Y.), 89. In *Muir v. Blake*, 57 Iowa, 662, 664, the question was raised but not decided whether a valid mortgage could be made of crops to be planted or grown. Rothrock, J., in delivering the opinion, said: "Whether or not there is any difference in principle between a mortgage upon crops to be planted and grown upon specific land, and the additions made to the stock of a merchant, is a question somewhat discussed by counsel for appellant. It is claimed that in the former the property has no potential being or existence, while in the latter the additions to a stock of goods are merely accretions or incidents to the principal thing included in the mortgage. It is difficult to draw a clear or well-marked distinction. It is true it may be said that a stock of goods is in the nature of a continuing entity, though the articles composing the stock may change;

while in case of a future crop, although the land has an existence, the crop has none, and the land not being mortgaged, there is much force in favor of applying the ancient rule that the grant of a thing not in being is void." But a mortgage of future crops was declared valid in *Wheeler v. Beeker*, 68 Iowa, 723.

² *Mulhall v. Quinn*, 1 Gray (Mass.), 105; *Hartley v. Tapley*, 2 Gray (Mass.), 565; *Low v. Pew*, 108 Mass. 347, per Morton, J.; *Payne v. Mobile*, 4 Ala. 333; *Purcell v. Mather*, 35 Ala. 570; *Stowell v. Bair*, 5 Bradw. (Ill.) 104; *Lormer v. Allyn*, 64 Iowa, 725; 21 N. W. Rep. 149; *McArthur v. Garman*, 71 Iowa, 34; 32 N. W. 14.

³ *Gardner v. Hoeg*, 18 Pick. (Mass.) 168; *Tripp v. Brownell*, 12 Cush. (Mass.) 376; *Low v. Pew*, 108 Mass. 347, per Morton, J.

⁴ *Cooper v. Douglass*, 44 Barb. (N. Y.) 409. See § 174.

another consideration which is not raised by a mortgage of crops, which are the annual product of labor and of the cultivation of the earth. Growing trees, fruit, and grass, which are the natural product of the earth, growing spontaneously and without cultivation, are parcel of the land, and, as part of it, descend with it to the heir. Until severed from the land, growing trees, fruit, and grass cannot be seized as chattels upon execution. They are within the Statute of Frauds, and cannot be sold or conveyed by parol; nor can any valid agreement for their sale be made, except by an agreement in writing.¹ On the other hand, annual products of the earth, such as crops of grain and vegetables, which are the result of yearly labor and cultivation, are chattels while still growing, and as such go to the executor rather than the heir. They may be seized on execution as chattels, and may be sold or bargained by parol.² In other words, crops which grow only by yearly cultivation are chattels, in contemplation of law, though not severed from the land; but trees and grass, and all other natural products of the earth, are parcel of the land until actually severed from it, or until so severed in contemplation of law, as where the owner of the fee of the land, by a conveyance in writing, sells these products to be taken from the land, or sells the land, reserving the trees or grass to be cut and removed by himself.³

146. Whether a chattel mortgage of growing trees or grass, by the owner of the land, can be considered a severance, in law, of such products from the land, so as to change them from real to personal property, is a question attended with some difficulties. On the one hand, it is said that such a mortgage does not work a severance, in law, of the trees or grass from the land until the mortgage becomes absolute by the non-performance of the conditions of the mortgage. Until such time, the legal owner

¹ Crosby v. Wadsworth, 6 East, 602; Carrington v. Roots, 2 Mee. & W. 248; Scorell v. Boxall, 1 You. & Jer. 396; Teal v. Auty, 2 Brod. & B. 99; S. C. 4 J. B. Moo. 542; Rodwell v. Phillips, 9 Mee. & W. 501, 505; Green v. Armstrong, 1 Den. (N. Y.) 550; Wintermute v. Light, 46 Barb. (N. Y.) 278; Kimball v. Sattley, 55 Vt. 285, 291, per Veazey, J.

² Evans v. Roberts, 5 Barn. & Cress. 829; Parker v. Staniland, 11 East, 362; Graves v. Weld, 5 Barn. & Adol. 105; Sainsbury v. Matthews, 4 Mee. & W. 343; Jones v. Flint, 10 Ad. & E. 753; Robinson v. Ezzell, 72 N. C. 231.

³ Smith v. Surman, 9 Barn. & Cress. 561, 573.

of the land is also the legal owner of the growing trees or grass, and has the right of possession of these and an interest therein. The legal ownership of both the land and these products being in the same person, the latter are part and parcel of the inheritance, and are real property.¹ But after the forfeiture of the condition of the mortgage, as the mortgagee, by the failure of the mortgagor to perform the condition, acquires by the mortgage an absolute title to the mortgaged property, there would be a severance, in contemplation of law, of the trees or grass from the land, and it would then become personal property belonging to the mortgagee. The owner of a farm, in the spring of the year, gave a chattel mortgage of all the produce of it, consisting in large part of meadow land. Subsequently, while the grass and the crops were growing, a creditor levied an execution upon the property specified in the mortgage. After the hay had been cut, another execution was levied upon the hay. The question therefore arose whether the mortgage, the first execution, or the second execution was the prior lien upon the proceeds of the hay. As to the mortgage the question was avoided, because the other property, aside from the hay, was more than sufficient to satisfy it, and therefore, on equitable principles, was so applied in exoneration of this part of the property included in it, which was the only property upon which the second execution could be levied. The levy of the first execution was held to be a nullity, because the grass was then a part of the realty; and the levy of the second execution upon the hay was held to be good, inasmuch as it was then personal property.²

In a later and more important case in Vermont, it was held that as between the parties a chattel mortgage of growing grass is valid, and when the mortgage becomes absolute by non-performance of the condition it operates a severance in law so as to change the grass from real to personal property; that a record of such mortgage is constructive notice to third parties after the grass is cut; and that such mortgage and record then constitute a valid lien as against an attachment as a chattel of the mortgagor.³

¹ *Bank of Lansingburg v. Cray*, 1 Barb. (N. Y.) 542, 547. And see *Cudworth v. Scott*, 41 N. H. 456, 463; *Kimball v. Sattley*, 55 Vt. 285, 292, per Veazey, J. Otherwise if the mortgagor

be not the owner of the land. *Jencks v. Smith*, 1 N. Y. 90.

² *Bank of Lansingburgh v. Cray*, *supra*.

³ *Kimball v. Sattley*, *supra*.

A mortgage of trees to be cut and severed from the freehold is a mortgage of personal property, and is to be recorded as a personal mortgage.¹ A mortgage of growing wood and timber, made by one who has purchased the same, to be cut and removed from the freehold, is a mortgage of personal property, to take effect, as such, when the wood and timber shall be severed from the freehold; and it will avail the mortgagee, if it be duly recorded as a chattel mortgage.²

The objection that growing grass is parcel of the realty does not avail against a mortgage of it as personal property when it is owned by one who does not own the land.³

147. The doctrine of potential possession has sometimes received a restricted application. Thus, in a case in New Hampshire, a farmer made a mortgage, in January, of "all the hay and grain, of every kind, that grows on the farm on which I now live, the present year." It appeared that part of the grain crop consisted of rye sown the preceding autumn, and part of rye, wheat, and oats sown in the spring after the making of the mortgage. In October, after the hay and grain had been gathered, they were attached as the property of the mortgagor by a creditor of his. In an action by the mortgagee against the sheriff, it was held that the former was entitled under his mortgage to hold the hay and the winter rye, as being *in esse* at the time of the execution of the mortgage, but was not entitled to hold any part of the grain crop sown after the making of the mortgage.⁴ "If we confine the terms of the grant," say the court, "to the actual grass or rye then in the soil of the grantor at the time of the execution of the deed, it may be inferred that the parties must have had knowledge that the grantor's farm had then, in actual or potential existence, the living agencies that do grow or produce both grain and hay. Here were then the living roots of the winter rye and grass then abiding in the soil, that formed the just basis for a crop of like kind, according to the invariable laws of vegetable growth,

¹ Cook v. Stearns, 11 Mass. 533; Nelson v. Nelson, 6 Gray (Mass.) 385; Douglas v. Shumway, 13 Gray (Mass.), 498; Erskine v. Plummer, 7 Me. 447; Cudworth v. Scott, 41 N. H. 456, 462; Wood v. Lester, 29 Barb. (N. Y.) 145.

² Clafin v. Carpenter, 4 Met. (Mass.)

580; and see Sheldon v. Conner, 48 Me. 584.

³ Smith v. Jenks, 1 Denio (N. Y.), 580; S. C. 1 N. Y. 90; Green v. Armstrong, 1 Den. (N. Y.) 550.

⁴ Cudworth v. Scott, 41 N. H. 456.

and, of course, a just foundation of the contract into which the parties chose to enter. It may not be unreasonable to limit the application of the deed to the product of such hay and grain as might grow from the rye that had been sown, and from the grass-roots, to the exclusion of any subsequent spring crop." And so, in New York, a mortgage of a field of potatoes before these are planted has been held to give no title to potatoes which are the product of such planting, as against a purchaser of them.¹ In Wisconsin, a mortgage of a crop of grain given by a lessee or owner of land in possession, at the time of planting it, or before it is up and has the appearance of a growing crop, is invalid.² But such a mortgage made after the seed sown has sprouted and made its appearance above ground as a growing crop, is effectual.³ In Illinois, also, a lien by way of mortgage cannot be created upon a crop of corn in the spring of the year, before it is planted; though a mortgage made in the spring of a crop of wheat sown the previous autumn is valid.⁴ The crop, when gathered, is liable to execution against the mortgagor, unless the mortgagee has previously taken possession of it.⁵ In Arkansas, too, a mortgage of an unplanted crop was void in law, prior to a recent statute⁶ making such a mortgage valid.⁷ To like effect it was held in a Kentucky case⁸ that a mortgage by a lessee, to secure the rent of a farm, of a crop to be raised on the farm, passed no title to a crop not sown when the mortgage was executed.

148. Accessions to mortgaged chattels made by the mort-

¹ *Cressey v. Sabre*, 17 Hun. (N. Y.), 120. It would seem that this case is not in accordance with *McCaffrey v. Woodin*, 65 N. Y. 459, aside from its being a case at law, while the latter is in equity.

² *Comstock v. Scales*, 7 Wis. 159; *Lamson v. Moffat*, 61 Wis. 153.

³ *Funk v. Paul*, 64 Wis. 35, per Cassoday, J.

⁴ *Hansen v. Dennison*, 7 Bradw. (Ill.) 73.

⁵ *Gittings v. Nelson*, 86 Ill. 591.

⁶ Acts 1874-75, p. 149.

⁷ *Tomlinson v. Greenfield*, 31 Ark. 557.

⁸ *Hutchinson v. Ford*, 9 Bush (Ky.), 318. The court said: "It was at the option of the lessee whether he would sow

wheat or other grain upon the premises; or, if he saw proper, he might have declined to cultivate the farm at all; and the fact that he had the right to the possession of the land for one year, by reason of his lease, gave neither an actual nor potential existence to crops that had not been sown upon it; and although he may have expected to sow and reap, and may have held the fee simple title to the land upon which the grain might have been produced, still the crop had no existence until its growth was developed in some form;" citing a similar case (*Milliman v. Neher*, 20 Barb. (N. Y.) 37) so decided, but in effect overruled by later decisions in that state.

gagor in good faith become subject to the mortgage lien. Thus, if a mortgage covers unfinished articles of manufacture, and the mortgagor afterwards adds labor and material to them, the mortgage covers the finished articles, both as against the mortgagor and his creditors.¹ As between the mortgagee and mortgagor, it matters not how much the article may be increased in value or changed in form, the mortgage attaches to the additions to the article mortgaged, as accessions made to the chattel as it was when mortgaged, which is regarded as the principal thing. "In case materials were mortgaged by a particular description, and with the assent of the mortgagee were manufactured into articles not answering to that description, and so changed that with reasonable diligence a creditor could not know that they were the same, if he should, without actual notice of the claim under the mortgage, attach them for a debt of the mortgagor, it would deserve serious attention whether, under our statute requiring mortgages of personal property to be registered, the mortgagee could hold against the attaching creditor."² But, as against an attaching creditor, a mortgage of leather cut and prepared for the manufacture of shoes covers shoes subsequently made from it by the mortgagor.³ A mortgage of cucumbers which were at the time in bulk and in salt, remains good against a creditor who has attached them after they have been "greened" and put into bottles and vinegar, which were not included in the mortgage.⁴ A rifle described in a mortgage as being in the form of a pistol stock, with a metallic skeleton stock and an under-action lock, is not so substantially changed by having a new wooden stock and a new over-action lock substituted in their place, as to authorize an attaching creditor to hold the weapon as against the mortgagee, provided it is capable of identification by parol evidence as the article originally included in the mortgage.⁵ Upon the same principle, a mortgage of a vessel covers new sails substituted for the old sails.⁶

¹ Reid v. Fairbanks, 1 C. L. R. 787; Sanford, 24 Ill. 17. Maine: Pulcifer v. Woods v. Russell, 5 B. & Ald. 942. Massachusetts: Harding v. Coburn, 12 Met. 333; Sumner v. Hamlet, 12 Pick. 76; Glover v. Austin, 6 Pick. 209; Ex parte Ames, 1 Lowell, 561. New Hampshire: Perry v. Pettingill, 33 N. H. 433. Rhode Island: Jenckes v. Goffe, 1 R. I. 511. New York: Dunning v. Stearns, 9 Barb. 630; Frost v. Willard, 9 Barb. 440. Illinois: Gregg v.

Page, 32 Me. 404.
² Perry v. Pettingill, *supra*, per Perley, C. J.

³ Putnam v. Cushing, 10 Gray (Mass.), 334.

⁴ Crosby v. Baker, 6 Allen (Mass.), 295.

⁵ Comins v. Newton, 10 Allen (Mass.), 518.

⁶ Southworth v. Isham, 3 Sandf. (N. Y.) 448; The Canada, 7 Fed. Rep. 248.

A mortgage of the furniture, lumber, and materials in a furniture factory, together with all furniture afterwards made in the factory, covers furniture afterwards manufactured out of such materials, and evidence is admissible that the furniture was manufactured from such materials.¹

A mortgage of an unfinished locomotive covers the additions thereafter made to it by the mortgagor, by way of accretion, although the materials added be not included in the mortgage.² Whether a mortgage of materials would hold new articles manufactured from those materials would depend very much upon the particular circumstances of the case; but it would seem in general that such a mortgage would not cover a manufactured article, not described at all in the terms of the mortgage.³

A mortgage of the rolling-stock of a railroad covers repairs and improvements thereof, though these be made in consequence of a change of the gauge of the road.⁴

Whether the lien of a mortgage continues upon old materials replaced by new, in the course of repairs or alterations of mortgaged chattels, depends upon the particular circumstances of the displacement of the old material. In general it would seem that if this is no longer suited for the same use to which it was originally applied, but can be used only by recasting or making over, the operation of the mortgage would cease upon this when it applies to the substituted materials.⁵

149. Under the rule that the incident follows the principal, a mortgage of domestic animals covers the increase of such animals,⁶ though it is silent as to such increase,⁷ and it is not incumbent upon the mortgagee to take and hold the property as against a purchaser of such increase. Thus, the owner of a cow or a mare may before gestation effectually sell or mortgage the

¹ *Dehority v. Paxson*, 97 Ind. 253.

² *Ex parte Ames*, 1 Lowell, 561.

³ *Ex parte Ames*, *supra*, per Lowell, J.

⁴ *Hamlin v. Jerrard*, 72 Me. 62.

⁵ *The Canada*, 7 Fed. Rep. 248; and see *Hamlin v. Jerrard*, *supra*.

⁶ *Forman v. Proctor*, 9 B. Mon. (Ky.) 124; *Cahoon v. Miers*, 67 Md. 573; 11 Atl. Rep. 278; *Rogers v. Highland*, 69 Iowa, 504; *Evans v. Merriken*, 8 Gill & J. 39;

M'Carty v. Blevins, 5 Yerg. (Tenn.) 195;

Fonville v. Casey, 1 Murph. (N. C.) 389;

Gundy v. Biteler, 6 Bradw. (Ill.) 510;

S. C. 12 Chicago L. N. 385; *Hughes v.*

Graves, 1 Litt. (Ky.) 317; *Nicholson v.*

Temple, 4 Pugsley & Bur. N. B. 248;

Darling v. Wilson, 60 N. H. 59.

⁷ *Funk v. Paul*, 64 Wis. 35; 24 N. W. Rep. 419; *Cahoon v. Miers*, *supra*.

future offspring, the possession of which, or the right of possession, will vest whenever such offspring shall be born. But as against innocent third parties, a mortgage of live stock does not create a lien on the increase thereof beyond the time requisite for the suitable nurture of the latter;¹ and more recently it has been decided that after the period of nurture has passed, and the young are separated from the mother, a purchaser in good faith for a valuable consideration acquires a title free from the mortgage.²

If the mortgage in terms covers the increase, it would seem that as between the parties to it the mortgage would remain a lien upon such increase until the debt is paid or the mortgage discharged as any other mortgage might be discharged. But as to subsequent purchasers the mortgage lien would not continue after the period of suitable nurture has passed, unless the purchaser has actual or constructive notice, if the young animals are in fact those referred to in the mortgage. If the increase are not mentioned in the mortgage, after the young have entirely separated from the mother, subsequent purchasers would have nothing to put them upon inquiry as to the existence of any lien upon the young, and would not be bound except upon receiving actual notice.³

An agreement in writing by the owner of a mare to pay the owner of a stallion twenty dollars in twelve months if his mare

¹ *Winter v. Landphere*, 42 Iowa, 471, per Beck, J.; *Fowler v. Merrill*, 11 How. 375; *Thorpe v. Cowles*, 55 Iowa, 408; *S. C. 7 N. W. Rep.* 649; *Kellogg v. Lovely*, 46 Mich. 131; *Darling v. Wilson*, 60 N. H. 59; *S. C. 49 Am. Rep.* 305; *Rogers v. Highland*, 69 Iowa, 504.

² *Boggs v. Stankey* (Neb.), 14 N. W. Rep. 392.

By statute in Colorado, Laws 1887, p. 76, a mortgage of live stock may bind the increase, if so provided. So in Wyoming Territory: R. S. 1887, § 77.

³ *Funk v. Paul*, 64 Wis. 35, 41, per Cassaday, J. "There would seem to be no valid reason for terminating the lien as against the mortgagor, merely because the period of 'suitable nurture' had passed. Such nurture did not give the lien, and its termination could not take it away as against the mortgagor. As to such mort-

gagor the question of notice or insufficiency of description is not involved, for he had actual notice that such increase was, in fact, covered by the mortgage. But as to subsequent *bonâ fide* purchasers and mortgagees without notice the question is different. As to them, the period of nurture being passed, and the young being entirely separated from the mother, and not being mentioned in the mortgage, nor any longer connected with the mother covered by the mortgage, they have neither actual nor constructive notice of the mortgagor's rights and interests, nor anything to put them upon inquiry. In the case before us the period of nurture had passed, and the calves were kept by the mortgagor in a field separated from the cows, so that a *bonâ fide* purchaser or mortgagee without notice would have been protected."

proved to be with foal by the stallion, — “colt holden for payment,” — was held to create a contract lien in the nature of a mortgage. Such a case is within the principle of a mortgage of property having a potential existence.¹

150. But when a mortgage of animals does not in terms cover the increase, or indicate that it was intended to cover such increase, and the animals are left in the possession of the mortgagor, it has been held that a purchaser of the increase, without actual notice of the mortgagee's claim to the same, would acquire a good title. Thus, a mortgage of cows which does not refer to the increase of them will not defeat a sale of such increase by the mortgagor in possession to one who has no actual notice of the mortgage. “The property in question,” say the court,² “is in no manner described in the mortgage, nor are any inquiries indicated therein which would enable a purchaser to ascertain that it was intended to be conveyed. In truth, the mortgage itself would tend to restrain inquiries, for it simply covers two cows, and nothing more. A purchaser would infer that nothing else was intended to be covered by the instrument. It cannot, therefore, be fairly claimed that the mortgage and the record thereof imparted notice of plaintiff's claim to the property. Whatever may be the rule in regard to the property in the increase of animals which are the subjects of transfers of this kind, it is very plain that if such increase follows the dam in ownership, a conveyance by the mortgagor having possession thereof to a purchaser without notice, actual or constructive, will be valid.”

151. Upon the principle of accession, plants and shrubs, the growth of cuttings from plants and shrubs mortgaged, pass to the mortgagee.³ The portions severed were before severance subject to the mortgage, and they are none the less so after severance. The mortgagee loses no right because, after severance, the cuttings remain in the same green-house in which the mortgaged plants were, in a condition for further growth and development.

¹ *Sawyer v. Gerrish*, 70 Me. 254; *Oakes v. Moore*, 24 Me. 214, 220; *Moore v. Byrum*, 10 S. C. 452; *S. C.* 30 Am. R. 58 and note, 63; *Farrar v. Smith*, 64 Me. 74, 77.

² *Winter v. Landphere*, 42 Iowa, 471; and see *Boggs v. Stankey* (Neb. 1882), 14 N. W. Rep. 392.

³ *Bryant v. Pennell*, 61 Me. 108.

152. Moreover, by the right of accession,¹ it has sometimes been held that substituted articles become subject to the mortgage. In such case it is, of course, immaterial that the mortgage does not specifically cover future property. Thus, a mortgage of a printing-press with all its appurtenances has been held to cover type and materials afterwards procured for the purpose of replenishing the establishment and supplying the place of lost and worn-out articles ; for such articles became attached to, and were a part of, the establishment mortgaged.² They were declared to form an incident to, and follow the title of, the printing establishment to which they were attached, and which was the principal thing ; "as if the borrower of a watch should replace its crystal, or of a musical instrument one of its strings, keys, or pipes, which had been lost, destroyed, or become useless whilst in his service, in which cases they would belong to the lender." A mortgage of a printing establishment will cover, by way of accession, new printing material purchased after the giving of the mortgage, to supply the wear, decay, and destruction of the old, when the new has been so commingled with the old as not to be readily distinguished ; but such material would not be included in the mortgage in case it be kept separate, so as to be readily distinguishable.³

152 a. When the question presented is one of title as between the mortgagor and mortgagee, and not as between the mortgagee and an attaching creditor or subsequent purchaser, the contract made by the parties has been held to determine their rights. Therefore if they have stipulated that the mortgagor of a stock of goods should be allowed to sell the same in the course of trade, but should, with the proceeds of the sales made by him, purchase other goods to replenish the stock, and that the goods so purchased should be subject to the mortgage, the title to goods purchased by the mortgagor and added to the stock is held to vest in the mortgagee. Under the stipulations of such a mortgage, the mortgagor may be regarded as the agent or trustee of the mortgagee, charged with the duty of using the proceeds of sales for the mortgagee's benefit. This is the view taken by the Supreme Court of Maine, which, in a recent decision upon such a

¹ "Omne principale trahit ad se accessionum."

² *Holly v. Brown*, 14 Conn. 255.

³ *Fowler v. Hoffman*, 31 Mich. 215.

mortgage, says: ¹ "We know no principle of law which prevents the parties from making such a contract, and if honestly executed by the mortgagors by using the proceeds of sales in purchasing other goods which were put into the store to take the place of those sold, the title to such goods is in the mortgagees, precisely the same as if they had made the sales and purchases themselves by the consent of the mortgagors." In this case, moreover, the mortgagor claimed that the additions to the stock were purchased on credit, and not with the proceeds of sales, and therefore that such additions could not be held under the mortgage. But the court held that the mortgagor was estopped from claiming this defence.

153. There are, however, some exceptional cases in which it has been held at law that a mortgage may cover property afterwards acquired. In one case,² a mortgage was given effect as to goods subsequently obtained by the mortgagor in exchange for some of the mortgaged goods. The mortgage was upon a stock of goods in the mortgagor's possession, and contained a stipulation that the mortgagor should retain possession of the goods, and pay over and account for the proceeds of all sales of goods to the mortgagee. In an action of trespass for taking away four hundred casks of lime obtained by the mortgagor in exchange for goods, or the proceeds of goods, mortgaged, the court held that the lime must be considered as substituted for the mortgaged goods by the mortgagor, acting as the agent of the mortgagee.

In a recent Mississippi case,³ a deed of trust was made of an iron-gray horse, and all other live stock which the grantor might own during the year. Within this time he exchanged the iron-

¹ *Allen v. Goodnow*, 71 Me. 420, 425. See, also, *Fejavary v. Broesch*, 52 Iowa, 88.

² *Abbott v. Goodwin*, 20 Me. 408. The principle announced in this case, that 'all persons coming in under the mortgagor stand by substitution in his place, equally affected by the contract whether notified of its existence or not,' is considered in *Jones v. Richardson*, 10 Met. (Mass.) 481, 487, by Wilde, J., as wholly wrong as applied by the court; for a mortgagor might be estopped in various ways to show that a mortgage was void, while an attaching

creditor would not be affected by the matter of estoppel. The argument also, that inasmuch as the proceeds of sales of mortgaged goods belong to the mortgagee, if new goods are purchased with such proceeds, these would belong to the mortgagee also, is regarded as fallacious.

³ *Davis v. Marx*, 55 Miss. 376; *Marx v. Davis*, 56 Miss. 745. And see *Harman v. Hoskins*, 56 Miss. 142, 149, per Simrall, C. J.; *Howell v. Francis* (N. J.), 10 Atl. Rep. 436.

gray horse for a bay horse, and subsequently traded the latter for a strawberry-roan horse, giving his note for the agreed difference in the value of the horses, and securing it by a deed of trust on the roan, the creditor secured having notice at the time of the prior mortgage. The court say that, within proper limitations, it is legitimate to mortgage property not *in esse* at the time, or not in the ownership of the debtor; and that on the same principle upon which a mortgage covers renewals of machinery and rolling-stock of a railroad, or renewals of farm-stock, the bay horse obtained in exchange for the iron-gray by even exchange would be covered by the first mortgage; and that this mortgage would also cover the strawberry-roan obtained by the second exchange, if that animal had been a mere exchange for the bay. It was accordingly held that the first mortgagee had a lien upon the strawberry-roan to the value of the bay horse; and it was ordered that the roan horse should be sold, and the proceeds to that extent applied to the satisfaction of the first mortgage, and the balance to the second.

154. The fact that the new goods were acquired by way of renewal of the goods on hand, or in substitution for them, or were paid for out of proceeds of the old, has seemed in a few cases to be the ground upon which the mortgage has been sustained as a lien upon the new goods; yet this ground has been so often declared ineffectual to give the mortgage any validity as to goods subsequently acquired, that no exception to the general rule prevailing at law regarding such mortgages can be sustained.¹ A mortgage of goods in a store, and "all renewals and substitutions for the same," the object being to include not only the articles then in the store, but whatever may be at any time therein in the course of the mortgagor's business, does not convey subsequently acquired goods, so as to give the mortgagee a right of action at law against a creditor or subsequent mortgagee seizing them.²

¹ Williams v. Briggs, 11 R. I. 476; Louis Drug Co. v. Dart, 7 Mo. App. 590. Hamilton v. Rogers, 8 Md. 301; Rose v. And see Lazarus v. Andrade, 5 C. P. D. 318. See § 172 a.

² Hamilton v. Rogers, *supra*. And see Dutcher v. Swartwood, 15 Hun (N. Y.), 31; Farmers' Loan & Trust Co. v. Long Beach Imp. Co. 27 Ib. 89; Wagner v. Watts, 2 Cr. C. C. 169.

Where a mortgage of the furniture of a coffee-house contained a stipulation that if any of the property should be sold, and other furniture purchased in its place, the latter should stand as security in the same manner, and that the mortgagor should execute a new mortgage, this stipulation was held not to bind the after-acquired property. There could be no legal lien upon this until a new mortgage was actually executed.¹

As against third persons there can be no substitution or exchange of property by the parties to a mortgage, so that the lien will attach to the substituted goods, unless the mortgagee take the latter into actual possession before the rights of such third parties intervene.² "If this doctrine were admitted," said Chief Justice Parker of New Hampshire,³ "a mortgage of personal property would be like a kaleidoscope, in that the forms represented would change at every turn; but unlike that instrument, in that the materials would not remain the same."

But as between the mortgagor and mortgagee, other property may be substituted for that included in the mortgage. Such property, however, is not then held by virtue of the mortgage, but by virtue of the agreement of the parties whereby an equitable lien, cognizable only in a court of equity, arises in favor of the mortgagee.⁴

155. When subsequently acquired goods have been commingled with a mortgaged stock, the burden is upon the mortgagee, in a suit at law to recover the mortgaged goods or their value, to show that the goods he claims were on the premises, or belonged to the mortgagor, at the date of the mortgage.⁵ Parol evidence is competent to identify the articles specifically described in the mortgage.⁶ Moreover, if the mortgage in terms covers goods afterwards to be acquired, the commingling of the mortgaged property with that subsequently acquired is presumed to

¹ *Codman v. Freeman*, 3 Cush. (Mass.) 306; *Griffith v. Douglass*, 73 Me. 532.

² *Rhines v. Phelps*, 3 Gilm. (Ill.) 455, 465; *Hunt v. Bullock*, 23 Ill. 320, 326; *Davis v. Ransom*, 18 Ill. 396; *Bell v. Shrieve*, 14 Ill. 462, 464; *Titus v. Mabee*, 25 Ill. 257, 260; *Simmons v. Jenkins*, 76 Ill. 479, 483; *Powers v. Freeman*, 2 Lans.

(N. Y.) 127; *Ranlett v. Blodgett*, 17 N. H. 298; *Griffith v. Douglass*, *supra*.

³ *Ranlett v. Blodgett*, 17 N. H. 298, 305.
⁴ *Bell v. Shrieve*, *supra*; *Simmons v. Jenkins*, *supra*.

⁵ *Hamilton v. Rogers*, 8 Md. 301; *Queen v. Wernwag* (N. C.), 2 S. E. Rep. 657.

⁶ *Caring v. Richmond*, 15 N. Y. Weekly Dig. 546.

have occurred with the mortgagee's permission; and if they have been so intermixed as to prevent their separation or identification, the rights of third parties purchasing or levying upon the goods cannot be affected.¹ A mortgage valid as to existing property, but invalid as to other property intended to be embraced in it, because not then existing, does not become a valid lien upon the latter by reason of its being intermixed by the mortgagor with the former. It is only a wilful intermixture of goods of another with one's own which entitles such other person to hold the whole.² Thus, under a mortgage of logs cut and to be cut by the mortgagor during the season, in a controversy between the mortgagee and a creditor of the mortgagor, who had attached all the logs, as well those covered by the mortgage as those cut after its execution, it appearing that they had been intermixed with the assent of the mortgagee, it was held that the mortgage was valid only as to such part of the logs as were cut before the execution of the mortgage, and the attachment was valid as to the part cut afterwards; and it appearing that the logs were alike in quality and value, the claimants were allowed to share ratably in proportion to the quantities cut before and after the mortgagee acquired his lien.³ Where the identity of the mortgaged goods is destroyed by the mortgagor's carrying on a retail business with the same for his own benefit, the mortgagee cannot hold the substituted goods unless they pass into his hands before other liens attach; but if such business be carried on with his consent, and new goods be added to the stock, the mortgage will be either wholly unavailing against a judgment creditor of the mortgagor, who has levied execution upon such stock,⁴ or good in part only. If the mortgagor purposely or negligently commingle the mortgaged goods with other like goods of his own, without the consent of the mortgagee, the latter may hold the whole under his mortgage.⁵

But if the mortgagee, with the consent of the mortgagor, take possession of mortgaged goods with which goods subsequently acquired have been mixed, both parties intending that all the goods shall be held by the mortgagee under the mortgage, such

¹ *Hamilton v. Rogers*, 8 Md. 301.

see *Dunning v. Stearns*, 9 Barb. (N. Y.)

² *Supra*; *Wagner v. Watts*, 2 Cranch C. C. 169.

630.

⁴ *Simmons v. Jenkins*, 76 Ill. 479.

³ *Mowry v. White*, 21 Wis. 417; and

⁵ *Willard v. Rice*, 11 Met. (Mass.) 493; *Dunning v. Stearns*, 9 Barb. (N. Y.) 630.

taking and delivery of possession will give him an effectual lien as against a subsequently attaching creditor.¹

156. A chattel mortgage upon after-acquired goods is valid against a *bonâ fide* purchaser with notice, for he can have no better title than his vendor, and such a mortgage is valid between the parties.² In a mortgage of a farm to secure the purchase money, it was provided that the mortgagor might cut the growing timber into wood, and that the mortgagee should have a lien upon the wood, and, upon demand, should have delivered to him such chattel mortgage or mortgages as might be necessary to perfect the lien. It was held,³ that although this agreement was not in itself a chattel mortgage, yet it was a valid agreement for such a mortgage, and would attach to the wood as it might be cut and severed from the freehold, and might be enforced against the mortgagor, and all persons claiming through him with notice of such lien; and a creditor of the mortgagor, levying execution upon the wood with notice of the prospective lien of the mortgagee, was not a *bonâ fide* purchaser, but took the wood subject to the prior equitable rights of the mortgagee.

But a mortgage made to cover ordinary additions to a stock of goods will not cover goods bargained for but never received by the mortgagor into actual possession for the purpose of his business.⁴

157. But the record of a mortgage is not sufficient notice of a legal incumbrance upon after-acquired property, "because by law no such property could be sold or conveyed thereby; and it would furnish no notice that any property would be afterward purchased, or, if purchased, that any act would be done to ratify the grant in that respect. As to such property, therefore, the mortgage could not be valid except as between the parties thereto, unless such goods were delivered by the mortgagor to the mortgagee with the intention to ratify the mortgage."⁵ The Supreme

¹ Cameron v. Marvin, 26 Kans. 612. See § 167.

S. C. 9 Cent. L. J. 199; McGee v. Fitzer, 37 Tex. 27.

² Robson v. Michigan Central R. R. Co. 37 Mich. 70; American Cigar Co. v. Foster, 36 Mich. 368; People v. Bristol, 35 Mich. 28; Cadwell v. Pray, 41 Mich. 307;

³ Wood v. Lester, 29 Barb. (N. Y.) 145.

⁴ Curtis v. Wilcox, 49 Mich. 425; 13 N. W. Rep. 803.

⁵ Jones v. Richardson, 10 Met. (Mass.)

Court of Wisconsin, quoting the language used above, say: "We are of opinion that this is a correct statement of the law, and that, in the absence of any actual fraudulent intent on his part, the purchaser from the mortgagor in possession is entitled to hold the property as against the mortgagee, he not having taken and retained the possession."¹ They held, further, that although the instrument be so ratified by the mortgagor after he has acquired the property, and before his sale of it, as to make it binding as against himself, this does not change the terms of the recorded instrument, or transform it into a valid mortgage on its face. It speaks the same language still, and informs the purchaser, not that the intended mortgagee has a lien upon such property, but that he has none. Even knowledge by the purchaser of the existence of such mortgage does not, in the absence of any fraudulent intent, prevent his holding the property as against the mortgagee not in possession.²

A registered mortgage of a growing crop is good against a prior verbal agreement for a lien upon it. Thus, a person who has verbally agreed to cultivate the land of another upon shares, and that the prospective crops should stand as security for any provisions advanced by the land-owner, becomes a tenant in common with the latter, and may make a mortgage of the crop, which,

481, 493, per Wilde, J.; followed in *Griffith v. Douglass*, 73 Me. 532, where Appleton, C. J., said: "The rights of parties are to be determined by the statute. To be protected, the mortgagee must take delivery and retain possession of the mortgaged property or have the mortgage recorded, otherwise his claim will not be 'valid against any other person than the parties thereto.' It is not enough that there be delivery, but there must be retention of the property mortgaged. But there can neither be delivery nor retention of such property unless the mortgagor has the same to deliver. Delivery by the mortgagor and retention by the mortgagee of the property mortgaged are the statutory equivalents of recordation. Whatever delivery and retention of possession will enable the mortgagee to hold will be equally held by the recorded mortgage. But what cannot be delivered and retained

cannot be recorded as what is to be mortgaged. The rights of the parties are statutory. The statute thus making the one the equivalent of the other, the record is valid only to protect goods which at the giving of the mortgage could be delivered and retained. Consequently the mortgage cannot be held to secure after-purchased goods, whatever may be its language." See, also, *Frost v. Willard*, 9 Barb. (N. Y.) 440; *Long v. Hines* (Kans.), 16 Pac. Rep. 339; *Cameron v. Marvin*, 26 Kans. 612, 628; *Cudworth v. Scott*, 41 N. H. 456; *Mowry v. White*, 21 Wis. 417; *Cressey v. Sabre*, 17 Hun (N. Y.), 120; *Chapman v. Weimer*, 4 Ohio St. 481; *Gittings v. Nelson*, 86 Ill. 591; *Tomlinson v. Greenfield*, 31 Ark. 557.

¹ *Single v. Phelps*, 20 Wis. 398. And see *Maier v. Davis*, 57 Wis. 212.

² *Single v. Phelps*, *supra*; *Mowry v. White*, *supra*.

when duly registered, will prevail over the secret verbal lien in favor of the land-owner.¹

While a growing crop may be sold or mortgaged, and the registration of the mortgage makes it effectual,² a future crop cannot be mortgaged, at least in such way as to make the registration of it effectual as against creditors or subsequent purchasers without notice. But such a contract is valid and binding as between the parties, and as against creditors or purchasers with notice even without registration.³

But in equity a mortgage of after-acquired chattels may be enforced against all persons having actual or constructive notice of it.⁴ A farmer having mortgaged a ten-acre field of growing wheat, without the consent or knowledge of the mortgagee, harvested, threshed, removed, and sold the wheat to one who, in the ordinary course of trade, purchased without actual knowledge of the fraud. It was held, however, that the record of the mortgage was constructive notice to the purchaser; and that the mortgagee, having the title to the wheat, could recover the value of the wheat of the purchaser, after he had converted it to his own use by mixing it with other wheat. The mortgagee was held to be entitled to identify the wheat so purchased as the wheat that was mortgaged, and for that purpose to use parol evidence. He was only required to trace the wheat into the hands of the purchaser, who, having mixed this wheat with other wheat of his own, could not complain that the wheat could not afterwards be identified. The change which the wheat underwent after the mortgage did not change the property so as to divest the title of the mortgagee.⁵

II. Ratification by New Act of the Mortgagor.

158. The maxim of Lord Bacon,⁶ that although a disposition

¹ Jones v. Chamberlin, 5 Heisk. (Tenn.) 210. And see Stamps v. Gilman, 43 Miss. 456.

² Butler v. Hill, 1 Bax. (Tenn.) 375; Williamson v. Steele, 3 Lea (Tenn.), 527.

³ Tedford v. Wilson, 3 Head (Tenn.), 311; Polk v. Foster, 7 Bax. (Tenn.) 98, per Nicholson, C. J.

⁴ Gregg v. Sanford, 24 Ill. 17; Scharfenburg v. Bishop, 35 Iowa, 60; Brown v. Allen, 35 Iowa, 306; Hughes v. Wheeler, 66 Iowa, 641; Hart v. Farmers' & Mechanics' Bank, 33 Vt. 252.

⁵ Duke v. Strickland, 43 Ind. 494. A similar decision was made in Butler v. Hill, 1 Bax. (Tenn.) 375, respecting a mortgage of a cotton crop. It is to be observed that while in Indiana the suit was in effect one at equity, all distinction between actions at law and in equity being abolished, that in Tennessee was at law.

⁶ "*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu.*" Bac. Max. Reg. 14.

of after-acquired property is altogether inoperative, yet such disposition may be considered as a declaration precedent, which derives its effect from some new act of the party after the property is acquired, holds an important place in the discussion of one branch of this subject. Its application is in law, not in equity. "The law," says Lord Bacon, "doth not allow of grants except there be a foundation of an interest in the grantor; for the law, that will not accept of grants of titles or of things in action, which are imperfect interests, much less will it allow a man to grant or encumber that which is no interest at all, but merely future. But of declarations precedent before any interest vested, the law doth allow; but with this difference: so that there be some new act or conveyance to give life and vigor to the declaration precedent. Now, the best rule of distinction between grants and declarations is, that grants are never countermandable, — not in respect of the nature of the conveyance or instrument, though sometimes in respect of the interest granted they are; whereas, declarations are evermore countermandable in their natures." The first part of the rule — that the grant of a future interest is invalid — is a general proposition which has never been effectually disputed in courts of law. The second part of the rule — that the declaration precedent may be made to take effect on the intervention of some new act — has also become an established proposition, but there has been much discussion regarding the new acts which may have this effect. In general, it may be said that new acts, to have this effect, must be done by the grantor in furtherance of the original grant, after he has acquired the property, and the acts must indicate his intention that the property shall pass by the grant already made.¹

159. But the mere bringing of after-acquired goods upon the premises by the mortgagor is not a sufficient new act by him within the rule. Thus, a bill of sale, made by way of security, by a meal-man of his furniture and stock in trade "then remaining and being, or which should at any time thereafter remain and be in, upon, or about his dwelling-house," was held not to authorize the grantee to seize goods not in the grantor's possession at

¹ Broom's Leg. Max. 502; Lunn v. Met. (Mass.) 481; Head v. Goodwin, 37 Thornton, 1 C. B. 379. Same construction adopted in Jones v. Richardson, 10 Me. 181; Griffith v. Douglass, 73 Me. 532; Cole v. Kerr, 19 Neb. 553.

the time of the execution of the bill of sale, but acquired afterwards.¹ In an action of trover by the grantor to recover such goods, Chief Justice Tindal, delivering the judgment of the court, said: "The principal contention on the part of the defendant [the grantee] was that the facts of this case brought it within the exception in Lord Bacon's rule; that the bringing of these goods onto the premises of the plaintiff [the grantor], where they were seized, at a time subsequent to the execution of the bill of sale, was the new act done by the plaintiff which gave the declaration contained in the previous bill of sale its effect. But to this it appears to us to be an answer, that the evidence at the trial is altogether silent upon the circumstances which accompanied the bringing of the goods on the premises; so that it is impossible to say whether it was the act of the plaintiff or not. And further, the new act which Bacon relies upon appears, in all the instances which he puts, to be an act done by the grantor for the avowed object and with the view of carrying the former grant or disposition into effect. Lord Bacon's language is, 'there must be some new act or conveyance, to give life and vigor to the declaration precedent;' which evidently imports more than the simple acquisition of the property at a subsequent time, which, if sufficient, would render the rule itself altogether inoperative; but points at some new act to be done by the grantor in furtherance of the original disposition." In conclusion, it was adjudged that, there being no new act done by the grantor indicating his intention that the after-acquired goods should pass under the former bill of sale, the case fell under the general rule, and no property in such goods passed to the grantee.

160. A power given to a mortgagee to seize after-acquired property, when acted upon, may give effect to a mortgage of such property, not only as between the parties, but also as against third persons claiming under the mortgagor. A *dictum* by Tindal, C. J., in *Tapfield v. Hillman*,² to this effect, has since been confirmed in numerous cases in England, and the doctrine fully established. An assignment by way of mortgage was made by

¹ *Lunn v. Thornton*, 1 C. B. 379; *S. C.* 9 Jur. 350; 14 L. J. (C. P.) 161. And see, also, *Gale v. Burnell*, 7 Q. B. 850; *Nicholson v. Temple*, 4 Pugsley & Bur. N. B. 248.

² 6 Man. & G. 245; and see *Cole v. Kerr*, 19 Neb. 553; *Hunter v. Bosworth*, 43 Wis. 583; *Roundy v. Converse* (Wis.), 37 N. W. Rep. 811.

a lessee to his lessor of furniture and stock in trade belonging to an inn, with a power to the lessor, upon default of the lessee in paying the rent, to enter upon the leased premises, and "to take, possess, hold, and enjoy all the goods, chattels, effects, and premises" mentioned in the assignment. Before the expiration of the term, the lessor entered upon the premises and seized the stock in trade, and other property which was not on the premises at the date of the deed. In an action of trespass, the court were of opinion that the *language* of the deed only covered the property upon the premises at the time of its date, and therefore that it was not necessary to decide whether, at law, goods subsequently acquired could be made subject to the assignment by any form of words. Chief Justice Tindal, however, said that "if the intention of the parties was that the security should extend to subsequently acquired property, that intention ought to have been clearly expressed;" and further, "that it would have been very easy to have so framed the power of entry as to make it extend to all effects upon the premises at the time that such power should be enforced, had such been the intention of the parties." The same learned judge, in a subsequent case,¹ in which the assignment in terms covered property not in existence, but gave no power to seize such property, held that it only covered property in existence at the time of its execution.

161. The doctrine founded upon the dictum of Tindal was

¹ *Lunn v. Thornton*, 1 C. B. 379. "The goods in dispute," he said, "were not goods 'remaining and being on the premises' at the time of the execution of the deed of bargain and sale, but were goods which had become the property of the plaintiff, and had also been brought upon the premises subsequently to the execution of that instrument, and were remaining thereon at the time of the seizure under the bill of sale. Under these circumstances it was contended by the defendant's counsel that the bill of sale covered these goods, as being goods remaining and being in or upon the dwelling-house at the time of the seizure; and the question is, whether the property in these goods passed under this bill of sale. *It is not a question whether a deed might not have been*

so framed as to have given the defendant a power of seizing the future personal goods of the plaintiff as they should be acquired by him and brought on the premises, in satisfaction of the debt, but the question before us arose on a plea which puts in issue the property in the goods, and nothing else; and it amounts to this: whether, by law, a deed of bargain and sale of goods can pass the property in goods which are not in existence, or, at all events, which are not belonging to the grantor at the time of executing the deed." This question he decides in the negative, unless the grantor has done some new act, other than the acquisition of the property, with the avowed purpose of carrying the declaration contained in his previous bill of sale into effect.

fully established in *Congreve v. Evetts*.¹ A farmer assigned, by way of mortgage, the crops of grain upon his farm, agreeing also that the mortgagee might seize and take possession of the crops assigned, or all such crops as might from time to time be found upon the farm. A year or more afterwards, the mortgagee took possession of the crops then growing upon his farm. Shortly afterwards, a creditor of the mortgagor levied an execution upon the crops and sold them, and the mortgagor himself subsequently became insolvent. In a trial at law by the mortgagee for the value of such property, it was held that he was entitled to recover. It was conceded on both sides that although the then growing crops passed on the execution of the deed, yet the future crops did not; but the plaintiff contended that, having taken possession of the growing crops, he was entitled to them. Baron Parke, delivering the judgment of the court, said: "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed, — not fully and entirely, but only to the extent of taking possession of the growing crops, — it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops. Whether the debtor give the possession of a chattel by delivery with his own hands, or point it out and direct the creditor to take it, or tell him to take anything he pleases for the payment of his debt by the sale of it, the effect, after actual possession by the creditor, is the same."

162. This doctrine has been confirmed in England in all subsequent cases where it was applicable. In *Hope v. Hayley*,² an assignment by way of mortgage covered goods in possession, and such as might afterwards be added to or substituted for them, with power, upon default, to enter and take possession of the mortgaged property. The mortgagor remained in possession a year or more, carried on the business, and in the ordinary course thereof used up and consumed certain of the consumable effects and substituted others. The mortgagee then entered and took

¹ 10 Exch. 298. Followed in *Hope v. Hayley*, 5 El. & Bl. 830; *Carr v. Allatt*, 3 Hurl. & N. 964; *Chidell v. Galsworthy*, 6 C. B. (N. S.) 471. And see *Petch v. Tutin*, 15 Mee. & W. 110; *Baker v. Gray*, 17 C. B. 462, 481; *Brown v. Bateman*, L. R. 2 C. P. 272; *Price v. Groom*, 2 Exch. 542; *Gale v. Burnell*, 7 Q. B. 850.

² 5 El. & Bl. 830.

possession, and the mortgagor subsequently became a bankrupt; and in a suit at law by the assignee in bankruptcy against the mortgagee, it was claimed that the mortgage was ineffectual for the purpose of passing the substituted property, but it was held otherwise. Lord Campbell, C. J., said: "Were, then, these substituted goods the property of the assignees under the bankruptcy? I am clearly of opinion that they were not. The intention of the contracting parties was that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a license to the grantee to enter upon the property, and that license, when acted on, took effect independently of the transfer."¹

A tenant, by way of security, assigned all the crops standing or growing upon the farm occupied by him, or upon any other farm which he might occupy during the continuance of the security; and all the farming stock and other rights he might be entitled to on quitting his present or any other farm; and he further authorized his creditor to seize and convert this property to the purposes of the security. A year or two after this transaction, the tenant took an adjoining farm and acquired additional farming stock; and some time after this, the creditor entered and took possession of the crops and effects, — both those upon the original and on the additional land. The tenant shortly afterwards made an assignment for the benefit of his creditors; and the assignee having entered and ejected the creditor, the latter brought a suit at law for conversion of his security, and recovered.² Chief Baron Pollock, and Barons Martin, Bramwell, and Watson, delivered separate and concurring opinions, placing the creditor's right to recover upon the ground that the assignment was intended to operate as a continuing security, and in terms applied to property afterwards acquired, and contained a power to seize such property, which power was actually exercised. "There is no dispute," said the last-named baron, "that a mere assignment will not pass after-acquired property; but for that very reason,

¹ In this case, Crompton, J., seemed disposed to go further than the common law rule would allow, in holding that the after-acquired goods were made subject to the trusts of the deed, and that it would not have been competent for the mort-

gagor to say that the trusts should not be executed. Perhaps he meant only that the license was coupled with an interest, and irrevocable.

² Carr v. Allatt, 3 Hurl. & N. 964.

here a power is inserted in the deed, which extends to such property."

163. But a power to seize after-acquired property cannot be exercised by a seizure of property acquired after the mortgagor has obtained a discharge in bankruptcy from the debt secured. The general principle, that a mortgage security is not taken away by the mortgagor's bankruptcy, does not apply in such case; for here no right or title to such property has vested in the mortgagee prior to the bankruptcy. There is simply a license to seize after-acquired goods for the purpose of selling them and discharging the debt; and the debt being gone before the license is used, and even before the property to which the license relates is acquired, the collateral license is gone also.¹

Moreover, a conveyance by the mortgagor to trustees for the benefit of creditors operates as a revocation of a license, not then exercised, to seize after-acquired property.² A power to take possession of after-acquired property must be executed according to its terms; and therefore a power, in case the sum due should not be paid *upon demand*, to enter and take possession of the goods, cannot be effectually exercised without previously making a proper demand for payment.³

There is no distinction between substituted and after-acquired goods, when the instrument gives the authority as to both.⁴

164. The same doctrine prevails in the American courts.⁵

¹ Thompson v. Cohen, L. R. 7 Q. B. 527; Lyde v. Mynn, 4 Sim. 505; S. C. 1 Myl. & K. 683, distinguished.

² Carr v. Acraman, 11 Exch. 566.

³ Belding v. Read, 3 Hurl. & Colt. 955.

⁴ Chidell v. Galsworthy, 6 C. B. (N. S.) 471.

⁵ § 178. Massachusetts: Rowley v. Rice, 11 Met. 333; Moody v. Wright, 13 Met. 17, 32; Chase v. Denny, 130 Mass. 566, 567; Mitchell v. Black, 6 Gray, 100; Butterfield v. Baker, 5 Pick. 522; Carington v. Smith, 8 Ib. 419.

Maine: Griffith v. Douglass, 73 Me. 532.

Michigan: Leland v. Collver, 34 Mich. 418.

Rhode Island: Cook v. Corthell, 11 R. I. 482; Williams v. Briggs, 11 R. I. 476.

New York: McCaffrey v. Woodin, 65 N. Y. 459; Brown v. Platt, 8 Bosw. 324; Kennedy v. Nat. Union Bank, 23 Hun, 494.

Illinois: Titus v. Mabee, 25 Ill. 257; Gregg v. Sanford, 24 Ill. 17; Hunt v. Bullock, 23 Ill. 320; Roy v. Goings, 6 Bradw. 162.

Ohio: Brown v. Webb, 20 Ohio, 389; Chapman v. Weimer, 4 Ohio St. 481.

Kansas: Cameron v. Marvin, 26 Kans. 612, 629.

Missouri: Thompson v. Foerstel, 10 Mo. App. 290.

Wisconsin: Chynoweth v. Tenney, 10 Wis. 397; Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207; Oliver v. Town, 28 Wis. 328; Morrow v. Reed, 30 Wis. 81.

Possession taken by a mortgagee of after-acquired property, under authority given in the mortgage, before rights had been acquired by others, makes it a valid lien upon such property. "A stipulation that future acquired property shall be holden as security for some present engagement is an executory agreement of such a character that the creditor with whom it is made may, under it, take the property into his possession when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into possession, before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but until such an act be done by him, he has no title to the same; and being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such case, is a continuing agreement; so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good. If, however, before taking possession, or doing such acts as are necessary to give vitality to the mortgage as to the subsequently acquired property, an attachment or assignment for the benefit of creditors takes place, the opportunity for completing the lien is lost; and the mortgage or pledge not being perfected, the property passes to the assignee, and must be held by him for the benefit of the creditors generally."¹ In a recent case in Rhode Island, the court say:² "If the grantor delivers the property, when acquired, to the grantee, in fulfilment of the conveyance, or allows him to take possession under the conveyance, the property thereupon passes and vests according to the terms of the conveyance both at law and in equity.

South Carolina : *Moore v. Byrum*, 10 S. C. 452, 462; *S. C. 7 Rep.* 696.

Alabama : *Booker v. Jones*, 55 Ala. 266, per *Brickell, C. J.*; *Stern v. Simpson*, 62 Ala. 194; *Columbus Iron Works Co. v. Renfro*, 71 Ala. 577.

United States Courts : *Miller v. Jones* (C. C. for N. J.), 15 N. Bank. R. 150, 160.

¹ *Chase v. Denny*, 130 Mass. 566; *Moody v. Wright*, 13 Met. (Mass.) 17, 32, per *Dewey, J.* (cited with approval in *McCaffrey v. Woodin*, 65 N. Y. 459, 463; in

Gregg v. Sanford, 24 Ill. 17; in *Moore v. Byrum*, 10 S. C. 452, 462; and in *Thompson v. Foerstel*, 10 Mo. App. 290, 302.

² *Cook v. Corthell*, 11 R. I. 482. And see *Williams v. Briggs*, 11 R. I. 476.

Otherwise where the mortgagor at the making of the mortgage had the possession of the property and the right to use it, and to become absolute owner. *Carpenter v. Scott*, 13 R. I. 477.

There is no need of any new conveyance or bill of sale; for the property, being personal, passes by delivery. And there is no need of the intervention of a court of equity to treat the conveyance as an executory contract, and decree its specific performance; for, looking at it in that light, the contract is specifically performed by the parties themselves." In Connecticut it is held that a mortgage of personal property not yet acquired by the mortgagor will take effect as against the mortgagee, and others claiming under him, on the vesting of the title to such property in the mortgagor, and the mortgagee's taking possession of it.¹ Thus, if a mortgage of a factory embrace such machinery and stock as may afterwards be purchased and placed upon the premises, it becomes operative upon such subsequently acquired property upon possession being taken by the mortgagee.²

In Alabama, where a mortgage of an unplanted crop is held to pass an equitable but not a legal title, a delivery of the crop to the mortgagee after it is gathered, or to the agent of a railroad company for transportation to the mortgagee, is such a new act in ratification and confirmation of the mortgage as passes the legal title.³

164 *a*. It is immaterial whether the mortgagee takes possession in invitum or the mortgagor voluntarily puts him in possession, if the act be done in pursuance of a license contained in the deed. In the one case as much as in the other, the mortgagee obtains possession by virtue of a valid contract which entitles him to such possession.⁴ Generally the mortgagee takes possession without the debtor's consent; but this is not always the case. A mortgage of a stock of goods, together with the future additions thereto, provided that the mortgagee might take possession whenever he should see proper. The mortgagee took possession, with the consent of the mortgagor. On the second day thereafter the mortgagor confessed judgment in favor of a creditor from whom he had purchased a portion of the stock on the day previous to the mortgagee's taking possession. Execution was

¹ Walker v. Vaughn, 33 Conn. 577; ³ Columbus Iron Works Co. v. Renfro, 71 Ala. 577. See § 143.

² Rowan v. Sharp's Rifle Man. Co. 29 - ⁴ Thompson v. Foerstel, 10 Mo. App. Conn. 282. It is to be observed that both 290. these cases were in equity.

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thereupon levied upon the mortgaged goods, and the mortgagee replevied them from the officer. It was held that judgment was rightfully given in favor of the mortgagee.¹ Under a trust deed covering with other property a herd of cows, and such cows as the grantor should afterwards substitute for those conveyed by the deed, the trustee demanded of the grantor to know what cows were embraced in the deed, and the grantor having pointed them out, the trustee took possession by placing a watchman over them in the pasture where they had previously been kept, and notified the grantor that he had taken possession under the provisions of the deed. The grantor on the next day executed a mortgage of these cows to another creditor, who shortly afterwards, during the temporary absence of the watchman, seized the cows and drove them off. It was contended that the cows purchased by the grantor subsequently to the execution of the deed were not embraced in it, and were not rightfully held by the trustee. But it was held that the deed was clearly intended to pass the substituted cows, and that the trustee, having perfected his title by taking possession before the giving of the mortgage, was entitled to recover in an action of replevin.²

165. A mere license to enter and hold under a mortgage after-acquired property is revocable, and cannot be exercised against the mortgagor's will.³ Thus, under a mortgage of a stock of merchandise now on hand, and such as should be added to it, with a power of seizure upon default, a seizure by the mortgagee by force, and against the grantor's will, does not make the mortgage operative upon such property.⁴ The Supreme Court of Wis-

¹ *Chapman v. Weimer*, 4 Ohio St. 481.

² *Thompson v. Foerstel*, 10 Mo. App. 390. In *Feary v. Cummings*, 41 Mich. 376, and in *Blakeslee v. Rossman*, 43 Wis. 116, possession taken without the consent of the mortgagee seems to have been regarded as insufficient to render the mortgage valid. In *Cameron v. Marvin*, 26 Kans. 612, there was a voluntary delivery of possession, and therefore the court declared there was no occasion to consider what would have been the effect of possession taken without the mortgagor's consent. See § 178.

³ *Thomas v. Sorrell*, Vaugh. 330, 351; *Wood v. Leadbitter*, 13 Mee. & W. 838, 844.

⁴ *Chynoweth v. Tenney*, 10 Wis. 397; *Single v. Phelps*, 20 Wis. 398; *In re Eldridge* (U. S. C. C. for Wis.), 3 Ch. Leg. N. 177. It would seem that the license in *Chynoweth v. Tenney*, *supra*, was, upon the authority of the cases cited in the next following section, one coupled with an interest, and therefore irrevocable. The doctrine of the Wisconsin cases seems exceptional. See § 164 *a* and note, and § 166.

consin, in *Chynoweth v. Tenney*, after citing the English cases, deduced from the principles thereby established the conclusion, "that an authority like the one in question is a revocable license; that, if unrevoked, it justifies the grantee in taking possession according to its terms, and that when he has so taken possession he has done it with the consent of the grantor, and his mortgage becomes good; but before it is executed the grantor may revoke it by forbidding the grantee to take possession, and that then it becomes wholly inoperative and void. We have arrived at this conclusion by the following process: 1. The various cases establish beyond question the proposition that such an instrument cannot operate as a transfer. 2. They also establish that it may operate as a license. And by applying to these two propositions the law fixing the nature and character of a license, the conclusion follows that it is revocable."

The revocation may be made indirectly, — as, for instance, by an assignment of the mortgagor's property in bankruptcy; or by some direct act on his part, such as refusing to allow the mortgagee to enter his premises. A covenant on his part not to revoke such license would be of little avail in case of the mortgagor's insolvency, though otherwise it would be the foundation of an action in which damages could be recovered,¹ and perhaps might afford a remedy in equity.²

166. But a license to enter and take after-acquired property, when coupled with an interest, is irrevocable; and such is the case when the mortgage deed comprises existing property, or existing and future property, with a power to seize the latter. There can be no grant, at law, of future property, and therefore a license connected with such a grant is a mere license. If, how-

¹ *Carr v. Acraman*, 11 Exch. 566. See *Smart v. Sandars*, 5 C. B. 895, 917, and note, per Wilde, C. J.

² There is some authority holding that an irrevocable power of attorney might be given to the mortgagee, authorizing him to do all acts necessary to the transfer of after-acquired property. See *dicta* in *Smart v. Sandars*, *supra*; *Walsh v. Whitcomb*, 2 Esp. 564; *Gausson v. Morton*, 10 Barn. & Cress. 731, 734. But whether such a power could be effectually given at

law or not, a power to deal with after-acquired mortgaged property is not revocable in equity. *Lepard v. Vernon*, 2 Ver. & Bea. 51; *Bromley v. Holland*, 7 Ves. 3, 28, per Lord Eldon. And in equity such a power would not be revoked by the mortgagor's death; *Spooner v. Sandilands*, 1 You. & Coli. 390; although it would in that case be revoked at law. *Watson v. King*, 4 Camp. 272; *Campanari v. Woodburn*, 15 C. B. 400.

ever, present, or present and future property, are comprised in a mortgage deed, a license to enter may be regarded as irrevocable, — as being one coupled with an interest.¹ This distinction, that while a mere license to enter and take possession is revocable, an instrument which also operates as a grant of future property is not revocable, seems to be recognized in New York. An instrument giving a lien upon goods and stock to be acquired, with power to take possession of such property and sell it on default, seems to have been regarded as constituting a grant, and not merely a license, by reason of the additional right given the mortgagee to sell the property and appropriate the proceeds.²

167. The taking possession of after-acquired property by the mortgagee does not avail to give him any title to it, unless it is embraced in the mortgage.³ The intention of the parties, that the mortgage shall take effect upon after-acquired property, must be expressed by the instrument itself, and cannot be shown by outside evidence.⁴ But inasmuch as the grant in the mortgage does not at law take effect upon the future property, the only connection between the original transaction and the transaction as subsequently completed by the mortgagee's taking possession of the after-acquired property, aside from the license to take possession of that, is the consideration for which the mortgage is made; and it is this connection which makes the delivery of possession by the mortgagor a ratification of the original mortgage, and not a new mortgage or pledge of the property so delivered.⁵

If, however, the mortgagee after the mortgage take possession of the mortgaged goods together with goods not mortgaged, under an agreement which amounts to a pledge of all the goods, this will be effectual both as to the goods not mortgaged and as to those

¹ Wood v. Leadbitter, 13 Mee. & W. 838; Wood v. Manly, 11 Ad. & E. 34.

² McCaffrey v. Woodin, 65 N. Y. 459.

³ Tapfield v. Hillman, 6 Man. & G. 245. See *S. C. supra*; Farmers' Loan & Trust Co. v. Commercial Bank, 11 Wis. 207. And see Reeve v. Whitmore, 33 L. J. (Ch.) 63; Brainerd v. Peck, 34 Vt. 496.

⁴ Farmers' Loan & Trust Co. v. Commercial Bank, 15 Wis. 424. The mort-

gage in this case, which was the same passed upon in 11 Wis. 207, was of a railroad and its appurtenances, and the case is fully examined in Jones on Railroad Securities, § 133.

⁵ See Rowley v. Rice, 10 Met. (Mass.) 7. The transaction was spoken of as being possibly only a new mortgage or pledge of the property.

embraced in the mortgage, though the mortgage be fraudulent as against the mortgagor's creditors; and the mortgagee will be protected as against a subsequent attachment made by creditors of the mortgagor.¹ The possession in such case is not under and by virtue of the mortgage, but under and by virtue of the pledge.²

As regards the validity of the transaction as a pledge, it is immaterial whether the possession be taken under an agreement contained in the mortgage, or in pursuance of an oral agreement made at the time possession is delivered. The mere fact that there is a mortgage previously executed does not invalidate the lien.³

168. An agreement to subject after-acquired property to a seizure and sale by a mortgagee is valid and operative according to its terms, as against the mortgagor and all others who acquire interests in it with notice. Or, in other words, the mortgagor is bound by his agreement, and cannot refuse to deliver up the goods accordingly. This is the view taken by the Supreme Court of Michigan. In the recent case of *Leland v. Collver*,⁴ it appeared that a mortgage was made of a stock of goods on hand, and all the stock the mortgagor might have from time to time in trade, he having the privilege of selling the goods in the usual course of trade, and applying the proceeds of the sales to buying other goods to keep up the stock and to support his family. The mortgagor, moreover, covenanted to keep up a stock of like goods,

¹ *Pettee v. Dustin*, 58 N. H. 309.

² See §§ 6, 399; *Cameron v. Marvin*, 26 Kans. 612, 629.

³ *Cameron v. Marvin*, 26 Kansas, 612, 631. "Indeed, we think the mortgages determine the nature and character of the lien. If the mortgages had been executed at the time that the property was delivered, instead of prior to the acquisition of the property, the description of the property contained in the mortgages would have covered this very identical property, and the title to the property would have passed under and by virtue of the mortgages; and in one sense — and in a very material sense — the mortgages were executed and made effective at the time the property was delivered; and the property, as the

court finds, was delivered under the mortgages. We suppose that if the mortgages had never been executed, the defendant would admit that the plaintiffs obtained a valid lien upon the property in the nature of a pledge, which could not be defeated by any attachment or other legal process levied upon the same by the defendant, for such is the law; and the mere fact that the mortgages had previously been executed, we do not think could prevent the plaintiffs from obtaining such lien."

⁴ 34 Mich. 418; *S. C.* 4 Cent. L. J. 7. And see, in confirmation, *American Cigar Co. v. Foster*, 36 Mich. 368; *Cadwell v. Pray*, 41 Mich. 307; *Curtis v. Wilcox*, 49 Mich. 425.

to a certain value, and agreed that the mortgagees might enter if the stock should not be kept up to that amount. The mortgagor continued the business for a year or more, and then sold his business to one who shortly afterwards sold to another, subject to this mortgage. The last purchaser took in partners, and continued the business for several months, in the mean time selling a large amount of goods and adding new goods of much less value to the stock, until the mortgagees seized the stock under their mortgage. The question presented was, whether the mortgagees could hold goods not on hand at the time the mortgage was given, but added to the stock afterwards by the mortgagor and other subsequent purchasers. The mortgagees, being sued in trover for a conversion of the goods, did not claim that the mortgage became operative in law as a present conveyance upon each successive addition to the stock subsequently purchased, but that it gave them authority to seize and subject such property to sale, unless prevented by the paramount right of some person intervening with a valid claim or title created prior to such seizure. The court sustained this claim.¹

¹ Campbell, J., delivering the opinion, saying: "It was held in *Holmes v. Hall*, 8 Mich. 66, that an agreement whereby a creditor was authorized, in a future contingency, to take possession of a stock of goods and sell them, but which contained no terms of transfer or hypothecation, was not a mortgage, but was only a beneficial power, which could not fix any rights in the property before seizure. A similar doctrine was held in *Dalton v. Laudahn*, 27 Mich. 529, where the power was contained in a lease. But it was further held, in the latter case, that the agreement was valid and operative according to its terms; and no good reason occurs to us, and we think there is no satisfactory authority, why it should not be. Parties can, if they choose, make contracts of agency, bailment, or other authority, as broadly as they choose, where no legal policy and no paramount right intervenes before their enforcement. And if these agreements contain a license or permission to take possession and sell, no court can deny the validity of the possession and sale if the

parties are capable of contracting, and no other rights intervene. Cases are not rare in which tenants of lands have been compelled to perform their stipulations to leave certain live stock, or other property, on the estate at the end of their leases. And trusts in personal property are of every-day occurrence in which the specific property is constantly changing, while the fund remains subject to the duties and burdens of the trust. Partnership operations are notable instances of this kind.

"In the present case the parties have seen fit to stipulate expressly that the body of the fund may be changed without losing its identity, and that the mortgagees may deal with it as if unchanged; the various purchasers have made their purchases subject to this arrangement, and are estopped from denying it. The mortgagees, in taking the property, did only what the mortgagor agreed they might do, and what the several purchasers also understood they were authorized to do. A purchase of property subject to such a power would certainly be regarded in equity as liable

169. Another form of ratification is by an indorsement upon the original mortgage, extending its operation over subsequently acquired property. Thus, a mortgage being made in January of all the stock of goods in the store then occupied by the mortgagor, and "also any and all additions that may from time to time be made to said stock" by the mortgagor, in the following May, the stock, with the additions to it then remaining unsold, was removed to another store by the mortgagor, who then indorsed upon the mortgage a writing, which was duly recorded, agreeing that the "mortgage, with this indorsement thereon, shall cover the portion of said stock removed, the same as though it had remained in the former store; and that it shall hold and cover any and all additions that have been or may be made to the same as though the stock had remained and been put into the former store." In a suit by the mortgagee against an officer for attaching the goods as the property of the mortgagor, it was held the mortgage, with the indorsement upon it, gave the plaintiff title to the stock as it existed in the second store at the time of the indorsement.¹

III. *In Equity.*

170. In General. — In the preceding sections it has been shown that a mortgage of future property is void, at law, as against others acquiring an interest in it, except in case the mortgagee takes possession of such property before any adverse interests have been acquired. A different rule, however, prevails in equity. There, while such mortgage itself does not pass the title to such property, it creates in the mortgagee an equitable interest in it, which will prevail against judgment creditors and others, although the mortgagee has not taken possession of the property, and the mortgagor has done no new act to confirm the mortgage. The ground of the doctrine is, that the mortgage, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being

to be subjected to a disposition in furtherance of the trust. Every one taking it on those terms becomes in equity a trustee of the fund. And where the contract itself points out the way for the enforcement of rights by act of the party, and he has only done what it was agreed he might do, it

would be unjust and absurd to hold him responsible as a wrong-doer as against those who were bound by the terms of their own holdings to allow him to do it."

¹ *Brown v. Thompson*, 59 Me. 372. See in this connection, *Griffith v. Douglass*, 73 Me. 532.

regarded as a trustee for him, in accordance with the familiar maxim, that equity considers that done which ought to be done.¹

171. The well-known leading case of *Holroyd v. Marshall*,² which has settled the policy of the law upon this subject in England, arose upon a mortgage of certain machinery and implements described in a schedule, and all other machinery and implements which should, during the continuance of the security, be fixed or placed on the premises in addition to or substitution for that specified in the schedule. Upon a bill in equity by the mortgagee against a judgment creditor of the mortgagor, who had levied an execution upon the after-acquired property, Lord Chancellor Campbell held that the latter had the better title to it, because the mortgagee had acquired by the mortgage only an equity in such property, which must give way to the legal right of a creditor, unless such equity has been perfected by possession before the levy of the execution.³ In the House of Lords, this

¹ *Williams v. Briggs*, 11 R. I. 476, per Durfee, C. J.; *Thompson v. Foerstel*, 10 Mo. App. 290, 299, per Thompson, J.; *France v. Thomas*, 86 Mo. 80.

² 10 H. L. Cas. 191 (1862). The doctrine here established has been partly stated in the earlier case of *Langton v. Horton*, 1 Hare, 549 (1842), where a mortgage was held to pass title to future property as between the parties, but as against the mortgagor's creditors it was regarded as necessary that the equitable title should be perfected by the mortgagee's taking possession.

By the civil law, a mortgage may cover the future property of the mortgagor. *Domat's Civil Law*, bk. 3, pt. 1, § 1, arts. 5, 7.

³ 2 De G., F. & J. 596, 603. In delivering judgment, the lord chancellor said: "My judgment rests upon Lord Bacon's maxim. [See § 158.] Before any subsequent act is done, the assignment gives an equitable interest as between assignee and assignor; but a legal interest, subsequently *bonâ fide* acquired before possession taken by the equitable assignee, shall prevail. I must further observe that, although the term 'equitable assignee'

is here used, he cannot be considered the assignee in equity of particular, specific goods, so as to make the assignor the bailee of these goods, or holder of them as trustee for the supposed assignee. A bill of sale in this form, as far as non-existing goods are concerned, is only executory, and only gives the supposed assignee an equitable right to have the after-acquired goods assigned to him.

"If the rights of the equitable assignee who has not taken possession were such as Mr. Malins contends for, it does seem strange that, till now, we have no instance of an equitable assignee filing a bill to restrain the sheriff from selling under a *feri facias*; and we have, as yet, no instance of an equitable assignee bringing an action for money had and received, to recover from the execution creditor the proceeds of the execution which he has received from the sheriff."

Lord Chelmsford, referring, in the House of Lords, to this part of the chancellor's decision, said: "The judgment of Lord Campbell, resting, as he states, upon Lord Bacon's maxim, determines that some subsequent act is necessary to enable 'the equitable interest to prevail against

decision, after two arguments, was reversed. Lord Westbury, then lord chancellor, delivered an opinion which not only convinced his colleague, Lord Wensleydale, who had upon the first argument come to a different conclusion,¹ but has ever since been regarded as conclusive in its reasoning and as settling the law. "The question may be easily decided," he said, "by the application of a few elementary principles long settled in courts of equity. In equity it is not necessary, for the alienation of property, that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed. And this is true not only of contracts relating to real estate, but also of contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed. But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time of a conveyance is void at law, simply because there is nothing to convey. So, in equity, a contract which engages to transfer property not in existence cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract,

a legal interest subsequently *bonâ fide* acquired.' It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property, at law and in equity. At law, property now existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen),

although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity, it is not disputed that the moment the property comes into existence, the agreement operates upon it."

¹ And who, as Baron Parke, had, in *Mogg v. Baker*, 3 Mee. & W. 195, 198, said (a *dictum*) that no equitable title to after-acquired property passed without a new intervening act.

and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it be so, then, immediately upon the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract; for if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained. Apply these familiar principles to the present case: it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom the mortgagor was bound to make a legal conveyance, and for whom he, in the mean time, was a trustee of the property in question.¹ There is another criterion to prove that the mortgagee acquired an estate or interest in the added machinery as soon as it was brought into the mill. If afterwards the mortgagor had attempted to remove any part of such machinery, except for the purpose of substitution, the mortgagee would have been entitled to an injunction to restrain such removal, and that because of his estate in the specific property."

172. Authority to the mortgagee to enter and seize after-acquired chattels is not an equitable mortgage of such after-acquired chattels, though coupled with an assignment of existing property by way of mortgage, nor does it create in the mortgagee any present equitable interest in them.²

¹ Upon this point see the later cases of *Leatham v. Amor*, 38 L. T. Rep. N. S. 785; *Lazarus v. Andrade*, 43 Ib. 30; *S. C.* 5 C. P. D. 318; *Clements v. Mathews*, 47 L. T. Rep. N. S. 251.

² *Reeve v. Whitmore*, 4 De G., J. & S. 1. This was a mortgage of the stock and appurtenances of a brick-field. Lord Westbury, lord chancellor, said: "If there had been, either upon the face of the deed ex-

pressly, or there could have been collected from the provisions of the deed by necessary implication, a contract or agreement between the parties that the mortgagee should have a security attaching immediately upon the future chattels to be brought on the premises, the mortgagee would have had a present interest in all those materials, whether manufactured or raw, which after the date of the security might have

Even under a mortgage which does not in terms provide for a lien upon the acquisitions, but simply binds a stock of goods on hand, a strong equity is raised in favor of the mortgagee as against the future additions or substituted goods, the result of the same business; and although that equity would not prevail against an attachment or levy made while it was no more than a general equity, yet where, by valid and formal agreement or otherwise, such equity becomes actually attached to the goods before any other lien intervenes, then it would prevail.¹

172 a. A valid lien in equity cannot be created upon goods which are not specifically defined by the instrument creating the lien. Thus, a bill of sale of all one's personal estate and effects then being or thereafter to be upon a certain farm or elsewhere in Great Britain, with power to seize and sell the same, does not create a charge even in equity upon the debtor's after-acquired property, because such property was not sufficiently determined.² The case was distinguished from that of *Holroyd v. Marshall* on the ground, as stated by Baron Martin, that the property in dispute in that case, which was new machinery, by being brought into the mill and affixed to the old machinery, was sufficiently ear-marked to entitle the mortgagee to file a bill for specific performance; while in the case then under consideration such was not the case. This view was affirmed in a later case, where a person attempted to charge "all his present and future personalty" to secure certain sums to his creditor. It was held that the instrument was not operative in equity as regards the undefined property.³

In a recent case before the Common Pleas Division, the court, referring to *Holroyd v. Marshall* and *Belding v. Read*, declared that the principle deducible from them is that property to be after acquired, if described so as to be capable of being identified, may

been brought on the brick-field. . . . I think there was no contract that immediately on the execution of the security the mortgagee should have such right, title, and interest with respect to such future property. Had there been in fact such a contract, it would have been an assignment, and would have fallen within the principles explained by the House of Lords in *Holroyd v. Marshall*." And see *Beld-*

ing v. Read, 3 Hurl. & Colt. 955; *S. C.* 34 L. J. (Exch.) 212; *Holmes v. Hall*, 8 Mich. 66; *Dalton v. Laudahn*, 27 Mich. 529.

¹ Per Campbell, J., in *People v. Bristol*, 35 Mich. 28.

² *Belding v. Read*, *supra*.

³ *Tadman v. D'Epineuil*, 20 Ch. D. 758.

be, not only in equity but also in law, the subject matter of a valid bill of sale by way of mortgage. In the case before the court, the assignment included stock in trade which might at any time during the continuance of the security be brought upon the premises, either in addition to or in substitution for stock in trade thereon at the date of the transaction. It was held that the property afterwards acquired became specific by being brought on the premises, and was subject to the bill of sale as against a creditor who had seized it upon execution.¹

173. Judge Story had announced the same doctrine in the leading American case of *Mitchell v. Winslow*, fifteen years prior to the decision of *Holroyd v. Marshall*. In that case a mortgage of all the tools and machinery in a cutler's shop, together with all that might be manufactured or purchased within four years, was held to be a good equitable lien, and protected as such under the Bankrupt Act. "It seems to me," said the eminent judge, "a clear result of all the authorities, that wherever the parties, by their contract, intend to create a positive lien or charge either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy." This may be regarded as the settled American doctrine.² In New Jersey this doctrine was

¹ *Lazarus v. Andrade*, 5 C. P. D. 318.

² 2 Story, 630, 644; *Beall v. White*, 94 U. S. 382; *Butt v. Ellett*, 19 Wall. 544; *S. C.* 1 Woods, 214; *Pennock v. Coe*, 23 How. 117; *National Shoe & Leather Bank v. Small* (D. C. Maine, 1881), 7 Fed. Rep. 837; *Schuelenburg v. Martin*, 1 McCrary, 348; 2 Fed. Rep. 747; *Brett v. Carter*, 2 Low. 458. **Arkansas**: *Apperson v. Moore*, 30 Ark. 56. **South Carolina**: *Parker v. Jacobs*, 14 S. C. 112; 10 Rep. 230; *Hirshkind v. Israel*, 18 S. C. 157. **Alabama**: *Robinson v. Mauldin*, 11 Ala. 977; *Floyd v. Morrow*, 26 Ala. 353. **Iowa**: *Scharfenburg v. Bishop*, 35 Iowa, 60; *Stephens v. Pence*, 56 Iowa, 257; 9 N. W. Rep. 215;

Fejavary v. Broesch, 52 Iowa, 88; *S. C.* 2 N. W. Rep. 963; *Wheeler v. Becker*, 68 Iowa, 723; *Hughes v. Wheeler*, 66 Iowa, 641; *Phillips v. Both*, 58 Iowa, 499; 12 N. W. Rep. 481. **Tennessee**: *Phelps v. Murray*, 2 Tenn. Ch. 746, per Cooper, C. **Mississippi**: *Sillers v. Lester*, 48 Miss. 513. **Rhode Island**: *Cook v. Corthell*, 11 R. I. 482; *Williams v. Winsor*, 12 R. I. 9; *Groton Manuf. Co. v. Gardiner*, 11 R. I. 626. **Maine**: *Griffith v. Douglass*, 73 Me. 532, per Apepton, C. J. **Missouri**: *Thompson v. Foerstel*, 10 Mo. App. 290, 299, per Thompson, J.; *Wright v. Bircher*, 72 Mo. 179; *Page v. Gardner*, 20 Mo. 507; *France v. Thomas*, 86 Mo. 80;

applied, in the same year of the decision of *Holroyd v. Marshall* in the House of Lords, to a mortgage, by the lessee of a hotel, of after-acquired furniture.¹ This property, having been seized upon execution by a creditor of the mortgagor, — who was about to sell it to satisfy the execution, — upon a bill in equity by the mortgagee, who had not taken possession of the property under his mortgage, the sale was restrained by injunction, the chancellor

Rutherford v. Stewart, 79 Mo. 216; *Hall v. Mullanphy Planing Mill Co.* 16 Mo. App. 454. *Illinois*: *Gregg v. Sanford*, 24 Ill. 17.

"The doctrine is too well settled to be now questioned," per Woods, J., in *Ellett v. Butt*, 1 Woods, 214. In *Beall v. White*, 94 U. S. 382, Mr. Justice Clifford said that in certain cases courts of equity "will permit the grant or conveyance to take effect upon the property when it is brought into existence and belongs to the grantor, in fulfilment of an express agreement, if founded on a good consideration, and it appears that no rule of law is infringed and the rights of third persons are not prejudiced." He adds: "Were it necessary to reconcile the decisions upon this subject, the effort would be involved in difficulty." And see *Pennock v. Coe*, 23 How. 117. But in *Massachusetts* it was held, in *Moody v. Wright*, 13 Met. 17, 30, that a mortgage is ineffectual, even in equity, to charge after-acquired property, without some further act by the parties after the property comes into existence. "Such act," say the court, "we deem to have been necessary to perfect the title of the petitioner, whether his rights of property in such after-acquired articles are sought to be enforced in equity or at law. We are fully aware that a different view of this question was taken by Mr. Justice Story in the case of *Mitchell v. Winslow*, 2 Story, 630, and that the result to which he came differs from ours as to the effect to be given to such mortgages in a court of equity." And see *Barnard v. Eaton*, 2 Cush. 294. In *Wisconsin*, also, it is held that a chattel mortgage of after-acquired property creates no lien, legal or equitable, by force of the mortgage. *Hunter v.*

Bosworth, 43 Wis. 583; *Chynoweth v. Tenney*, 10 Wis. 397; *Lanyon v. Woodward*, 55 Wis. 652-657, per Lyon, J.; *Case v. Fish*, 58 Wis. 56, 96.

A stipulation in a contract for raising a crop upon shares, giving a charge upon some part of the crop in favor of one of the parties, is not a mortgage of such part. *Lanyon v. Woodward*, 55 Wis. 652. A mortgage of future property may, however, operate as a license to seize it, when it is acquired by the mortgagor. *Roundy v. Converse* (Wis.), 37 N. W. Rep. 811; *Hunter v. Bosworth*, *supra*.

In the recent case of *Brett v. Carter*, 2 Lowell, 458, in the District Court of the United States for Massachusetts, Judge Lowell, remarking upon the decision in *Moody v. Wright*, said: "Considering the decision by Judge Story in this circuit, and the reasons given by the court of Massachusetts for not following it, and the entire consistency of all the recent decisions with Judge Story's views, and the disappearance of Baron Parke's *dictum*, I am not prepared to say that if the Supreme Judicial Court were now asked to review their decision in *Moody v. Wright*, it is at all certain they would not reverse it; and under the circumstances I do not feel bound to hold that that case furnishes a settled rule of property which I must follow. So far from that, I believe that the law of Massachusetts in equity is that a mortgage of after-acquired chattels is valid."

See Article 15, *Am. Law Rev.* 121..

¹ *Smithurst v. Edmunds*, 14 N. J. Eq. 408. And see *Gevers v. Wright*, 18 N. J. Eq. 330; *Williamson v. New Jersey Southern R. R. Co.* 29 N. J. Eq. 311.

adopting the principles announced by Judge Story in *Mitchell v. Winslow*. In New York this doctrine is fully adopted. In a late case it was applied to a clause in a lease of a farm giving the lessor "a lien as security for the payment of the rent aforesaid, on all goods, implements, stock, fixtures, tools, and other personal property which may be put on said premises, such lien to be enforced, on the non-payment of the rent aforesaid, by the taking and sale of such property in the same manner as in cases of chattel mortgages." The mortgagee having taken possession of certain crops raised upon the farm, in an action of trover by the lessee to recover them, it was held that the mortgage in equity (he having the right under the Code¹ to urge an equitable defence) acquired the beneficial interest and title to the property immediately upon its coming into existence, or upon the mortgagor's acquiring the property.²

The rule is also adopted in Virginia. Thus, a covenant duly recorded made by an owner of a cotton factory, for the purpose of securing advancements for the purchase of cotton and for other expenditures connected with the manufacture of cotton goods, to deliver to the lender all the goods manufactured, is in effect a mortgage and is valid in equity.³ The covenant having been duly recorded is notice to all persons claiming under the manufacturer. The right of the mortgagee to not only the manufactured goods, but to the raw cotton, and cotton yarn on hand, is preferable to the right of an execution creditor of the manufacturer, under an execution issued since the covenant was executed.

In Kentucky it was declared in one case that if a mortgage of

¹ Code N. Y. § 150.

² *McCaffrey v. Woodin*, 65 N. Y. 459 (overruling *S. C.* 62 Barb. 316). *Dwight, C.*, after referring to the principle established in *Holroyd v. Marshall* and *Mitchell v. Winslow*, etc., said: "There appears to be no well-considered decision in the equity reports to the contrary. There are several *dicta* by judges sitting in courts of law in opposition to those views, but they find no support in the equity tribunals." As in *Otis v. Sill*, 8 Barb. (N. Y.) 102. See *Cressey v. Sabre*, 17 Hun (N. Y.), 120, which was a case at law, inasmuch as the action was originally brought in a justice's court, which has no equitable ju-

risdiction; "no equities of the parties can therefore be regarded or protected." *Levy v. Welsh*, 2 Edw. (N. Y.) Ch. 438 (1835), was a case in equity of a mortgage of present and future stock in trade, which was held good for such of the stock as was on hand at the time of the mortgage, and such as was afterwards purchased and paid for out of the proceeds of that stock, and no further.

³ *First National Bank v. Turnbull*, 32 Gratt. (Va.) 695; *S. C.* 22 Alb. L. J. 96; *Borst v. Nalle*, 28 Gratt. (Va.) 423; *Brockenbrough v. Brockenbrough*, 31 Gratt. (Va.) 580.

property to be acquired *in futuro* can be upheld in equity, it can only be enforced as a right under the contract, and not as a trust attached to the property.¹ A mortgage or lien upon a stock of merchandise and upon additions made thereto is good between the parties, and, until attached for fraud, against antecedent creditors of the debtor, both as to the stock on hand at the time of the sale and as to that subsequently purchased;² but in general a mortgage of future property is void as against creditors who assert their rights.³

173 a. The mortgage must in terms show that it was intended to include future property. Thus, a mortgage of a stock of merchandise will not cover subsequent additions to the stock, unless it be expressly provided that such acquisitions shall be included in it. Even a recital in the mortgage that the grantor is to have the privilege of retailing the stock, but is to keep it up as full as it now is, as nearly as possible, is held insufficient to extend the mortgage to subsequent purchasers. The court say that this provision would seem to indicate something in the direction of an intention to include future acquisitions of goods. But to make it operate according to such intention imperfectly expressed, the mortgage must first be reformed. If not reformed it must be taken as it reads. Its provisions cannot be extended by inference.⁴

It is essential also that the intention that the mortgage shall cover after-acquired property should be clearly expressed. Thus, a mortgage of a stock of groceries and "all books of account and rights of credit arising out of said business" was held not to include rights of credit arising after the execution of the mortgage, but only such as had previously accrued.⁵

¹ *Ross v. Wilson*, 7 Bush, 29.

² *Zaring v. Cox*, 78 Ky. 527; *S. C.* 1 Ky. Law Rep. 161; *Davenport v. Foulke*, Ind. Cent. L. J. May 28, p. 427.

³ *Loth v. Carty* (Ky.), 4 S. W. Rep. 314.

⁴ *Phillips v. Both*, 58 Iowa, 499, 12 N. W. Rep. 481.

⁵ *Lormer v. Allyn*, 64 Iowa, 725; 21 N. W. Rep. 149. See, also, *Norris v. Hix* (Iowa), 38 N. W. Rep. 395; *Phillips v. Both*, *supra*.

A mortgage of "all the goods and chat-

tels mentioned in the schedule hereunto annexed, and now in our possession in our store-room," the schedule including "all the stock of merchandise," etc., "and also including all that may at any time during the continuance of the mortgage be purchased and obtained to replenish or replace the same, or any part thereof," shows an intention of the parties to mortgage after-acquired property purchased to replace or replenish any on hand at the date of the mortgage, and is sufficient to

The intention that the mortgage shall take effect upon property to be afterwards acquired cannot be shown by extrinsic evidence, but must be expressed in the instrument itself.¹

174. All kinds of future chattels and chattel interests may in equity be mortgaged. There may be a good equitable mortgage of the earnings of a vessel for a voyage not yet undertaken;² and it is not necessary to specify any particular voyage, but only to include, in general, the freight to be earned.³ So, also, the future cargo of a ship may be mortgaged. Thus, a mortgage of a whale-ship, her tackle and appurtenances, "and all the oil and head-matter, and other cargo which might be caught and brought home in the ship, on and from her then present voyage," was sustained against a judgment creditor of the mortgagor. "It is impossible to doubt," said Wigram, V. C.,⁴ "for some purposes at least, that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value." A mortgage, by a lessee of a plantation, of all the mules then upon the premises, or that might be put upon them during the year, was held to cover mules afterwards purchased and put upon the plantation within the year, in preference to another mortgage of them made after the mortgagor had purchased the animals.⁵ A lease of a large hotel affords a sufficient basis for a reservation of a lien by the lessor, in the nature of a mortgage, upon the furniture afterwards to be put into the building. A hotel must necessarily be furnished, in order to adapt it to the uses for which it was intended. The furniture may be regarded as an incident to the hotel, in the same way that rolling-stock is regarded as an inci-

bind such after-acquired property. The schedule referred to in the mortgage is a part and parcel of the mortgage itself, and the court will construe the two together. *Page v. Kendig* (N. J.), 7 Atl. Rep. 878. See, also, *Hulsizer v. Opdyke*, Ib. 879; *Howell v. Francis* (N. J.), 10 Ib. 436.

A mortgage of a horse and all earnings of the horse, whether by premiums or otherwise, was held not to cover premiums earned after the execution of the mort-

gage. *McArthur v. Garman* (Iowa), 32 N. W. Rep. 14.

¹ *Montgomery v. Chase*, 30 Minn. 132.

² *Curtis v. Auber*, 1 Jac. & W. 526; *Langton v. Horton*, 1 Hare, 549; *In re Ship Warre*, 8 Price, 256, 269.

³ *Douglas v. Russell*, 4 Sim. 524; *S. C.* 1 Myl. & K. 488; *Leslie v. Guthrie*, 1 Bing. N. C. 697, 708; *Lindsay v. Gibbs*, 22 Beav. 522.

⁴ *Langton v. Horton*, *supra*.

⁵ *Sillers v. Lester*, 48 Miss. 513.

dent to a railroad.¹ A mortgage may be made of an unplanted crop, and the lien attaches, in equity, as soon as the crop is gathered, and may be enforced against purchasers with record notice.² A statute of Mississippi,³ providing that it should be lawful to mortgage any crop of cotton to be produced within fifteen months from the date of such mortgage, was merely declaratory of what the law was before its passage, with a limitation that the crop must be produced within a given time. A mortgage made before such statute, of a crop to be produced in the future, was valid in that state.⁴

A manufacturer may make a valid mortgage of raw material to be purchased in the future, and of the product to be made therefrom.⁵ A mortgage of turpentine and rosin then in possession of the mortgagor, or which he might produce or prepare for market, or otherwise acquire, covers not only the turpentine and rosin which the mortgagor might produce upon his farm, but also that which he might purchase or otherwise acquire.⁶

Of course, it is essential that the after-acquired chattels intended to be covered by the mortgage should be definitely pointed out, so that they may be distinguished from other chattels of the same kind; but it is sufficient that the ship, mill, or place into which they are to be brought, or the farm or land upon which the future crops are to be raised, is described,⁷ or that the means of identification are pointed out. Thus, if a mortgage be made of a certain number of bales of cotton of the first picking of the crop for a year named, the cotton is capable of identification, and the lien attaches to the first cotton that is picked until sufficient is baled to satisfy the terms of the mortgage.⁸

¹ *Wright v. Bircher*, 5 Mo. App. 322; affirmed 72 Mo. 179, where the court say: "We may with confidence assert that the doctrine of this court on the subject is in perfect harmony with that announced in *Mitchell v. Winslow*, and we see no reason to depart from it."

² *Butt v. Ellett*, 19 Wall. 544. **Arkansas**: *Apperson v. Moore*, 30 Ark. 56; *Jarratt v. McDaniel*, 32 Ark. 598. **Alabama**: *Varnum v. The State*, 78 Ala. 28; *Mayer v. Taylor*, 69 Ala. 403; *S. C.* 44 Am. Rep. 522; *Grant v. Steiner*, 65 Ala. 499; *Hurst v. Bell*, 72 Ala. 336; *Booker*

v. Jones, 55 Ala. 266; per *Brickell*, C. J. **Mississippi**: *White v. Thomas*, 52 Miss. 49.

³ Of February 18, 1867.

⁴ *Ellett v. Butt*, 1 Woods, 214 (affirmed 19 Wall. 544); *White v. Thomas*, *supra*. And see *Betts v. Ratcliff*, 50 Miss. 561.

⁵ *Frank v. Playter*, 73 Mo. 672; following *Wright v. Bircher*, 72 Mo. 179.

⁶ *Parker v. Jacobs*, 14 S. C. 112.

⁷ *Brett v. Carter*, 2 Low. 458, 461, per *Lowell*, J.

⁸ *Senter v. Mitchell*, 5 McCrary, 147; 16 Fed. Rep. 206.

175. Mortgages of railroad companies very generally in terms cover personal property which they may thereafter own and use in connection with their roads. But such mortgages, in equity, create a valid lien upon such after-acquired property, although at law they do not operate at all upon property not then in existence.¹ While the decisions are nearly uniform that mortgages of the roadbed of a railroad, with the rolling-stock and other articles essential to the exercise of the franchise of a railroad company, will be enforced in equity, although made to cover future additions and incomes to be earned, the decisions are not quite uniform in the reasons assigned for them. In general, it may be said that such mortgages are sustained upon the ground that in equity they transfer the beneficial interest in the after-acquired property, and attach to it immediately on its being acquired, coming within the class of contracts of which a court of equity will decree a specific performance. The further reason applies, that the public interest is involved in the enforcement of such mortgages, and there is, therefore, an additional equity beyond that applicable to an ordinary mortgage of after-acquired property.

¹ *Henshaw v. Bank of Bellows Falls*, 10 Gray (Mass.), 568; *Morrill v. Noyes*, 56 Me. 458; *Hamlin v. Jerrard*, 72 Me. 62. Cases of railroad mortgages covering future property are not cited here, because the subject is fully examined in *Jones on Railroad Securities*, §§ 121-145. And see 4 South. Law Rev. 198.

CHAPTER V.

DELIVERY AND POSSESSION OF MORTGAGED CHATTELS.

176. At common law a mortgage valid against creditors could only be made by a delivery of the property. It was essential that the custody and possession of the goods should be delivered to and retained by the mortgagee.¹ The intent of the statutes providing for the recording of mortgages of personal property was to do away with the necessity of any delivery of the property, and to enable mortgagors to hold possession until default. For this purpose registration is required as giving, perhaps, even greater notoriety to the transaction than delivery and retention of possession. Registration thus becomes a substitute, as well for delivery as for retaining possession of the property. No formal, symbolical, or constructive delivery of the mortgaged property is necessary, where the execution, delivery, and registration of the instrument of conveyance are duly proved, and where good faith in the transaction, adequate consideration, and other requisites of a valid mortgage are shown.² It is to be understood, however, that the articles mortgaged must be of such a nature and so situated as to be capable of being specifically designated and identified by written description. If they require to be weighed, measured, counted off, or otherwise separated from other and larger parcels or quantities, such requisites are not to be considered as dispensed with by registration.³

As between the parties, delivery and possession, while essential to constitute a pledge, are not necessary to the validity of a mortgage. In this respect the common law rule has not been changed by statute.⁴ But at common law a mortgage might under some

¹ Russell v. Fillmore, 15 Vt. 130; Woodward v. Gates, 9 Vt. 358; Sturgis v. Warren, 11 Vt. 433.

² Bullock v. Williams, 16 Pick. (Mass.) 33; Forbes v. Parker, Ib. 462; Shurtleff v. Willard, 19 Ib. 202; Frank v. Miner,

50 Ill. 444; McCoy v. Lassiter, 95 N. C. 88, 91.

³ Per Shaw, C. J., in Bullock v. Williams, *supra*.

⁴ McCoy v. Lassiter, *supra*. In Texas it is said that when the possession of mort-

circumstances be valid as against third persons without immediate delivery and possession,¹ just as a sale might be valid without such delivery and possession.² The statutes, however, relating to the recording or filing of mortgages, make them void as to third persons, unless they be accompanied by delivery and possession, or they be recorded or filed in the manner prescribed.

Under the recording acts generally in force, if there be a change of possession of the mortgaged property, there is no need of recording the mortgage or the bill of sale to make it valid against third persons. Possession by the mortgagee or vendee is equivalent to notice by registration.³ Possession taken under an absolute bill of sale, though subsequent to its execution, is equivalent to the filing of the same in the proper office, and is notice of the nature and extent of the vendee's claim.⁴

177. A mortgagee's title under a mortgage not recorded is incomplete until he takes possession. He is entitled to possession as against the mortgagor, and also against any subsequent purchaser or mortgagee of the property, so long as such purchaser or mortgagee has not completed his title by taking possession;⁵ and the prior mortgagee may take possession of the property, although it be in the *joint* possession of the mortgagor and a creditor of his to whom he has given a bill of sale, for the title of the latter remains incomplete.⁶

178. If a mortgagee take possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid

gated chattels is delivered to the mortgagee, the transaction becomes in effect a pledge. In that state a mortgage is held not to pass the legal title, but to confer merely a lien. *Hudson v. Wilkinson*, 61 Tex. 606.

¹ *Homes v. Crane*, 2 Pick. (Mass.) 607; *Haven v. Low*, 2 N. H. 13; *Morrow v. Turney*, 35 Ala. 131.

² See chapter ix.

³ *Morrow v. Reed*, 30 Wis. 81; *Janvrin v. Fogg*, 49 N. H. 340; *Humphries v. Bartee*, 10 Sm. & M. (Miss.) 282; *Grice v. Haskins*, 73 Ga. 700.

⁴ *First Nat. Bank v. Damm*, 63 Wis. 249; *Coe v. Manseau*, 62 Wis. 81.

⁵ *Coble v. Nonemaker*, 78 Pa. St. 501. In *Michigan* the statute, § 211, *infra*, requires an *immediate* delivery or a record of a mortgage, and therefore a subsequent delivery, though before an attachment made by a creditor of the mortgagor, is ineffectual. *Wallen v. Rossman*, 45 Mich. 333. Such is also the case in *New Jersey*: *Currie v. Knight*, 34 N. J. Eq. 485, 486; *Williamson v. N. J. Southern R. R. Co.* 28 Ib. 277; *S. C.* 29 Ib. 311.

⁶ *Coty v. Barnes*, 20 Vt. 78.

between the parties, although it be not acknowledged and recorded, or the record be ineffectual by reason of any irregularity.¹ The subsequent delivery cures all such defects; and it also cures any defect there may be through an insufficient description of the property. The taking of possession is an identification and appropriation of the specific property to the mortgage.² If there be two mortgages of the same property, and both be void as to creditors and purchasers, by reason of not being acknowledged before the proper officer, if the junior mortgagee first obtains possession, he will hold it as against the prior mortgagee;³ and in some states the fact that he had notice of the prior mortgage would make no difference, while in others actual notice would be equivalent to constructive notice by record.⁴

Delivery of possession under a mortgage, before rights have been acquired by others, will cure any invalidity there may be in the instrument, whether arising from an insufficient description of the property,⁵ an insufficient execution of the instrument, the omission to record it,⁶ or from its containing a provision which makes it void except as between the parties.⁷

¹ § 164. *Hansett v. Harrison*, 105 U. S. 401, 405; *Wood v. Weimar*, 104 U. S. 786. **Arkansas**: *Applewhite v. Harrell Mill Co.* 5 S. W. Rep. 292. **Illinois**: *Chipron v. Feikert*, 68 Ill. 284; *Frank v. Miner*, 50 Ill. 444. **Indiana**: *McTaggart v. Rose*, 14 Ind. 230. **Ohio**: *Brown v. Webb*, 20 Ohio, 389. **Massachusetts**: *Chase v. Denny*, 130 Mass. 566. **Michigan**: *Parsell v. Thayer*, 39 Mich. 467. **Minnesota**: *Eastman v. Water Power Co.* 24 Minn. 437. **Nevada**: *Clute v. Steele*, 6 Nev. 339; *Moresi v. Swift*, 15 Nev. 215. **New York**: *Field v. Baker*, 12 Blatchf. 438; *Brown v. Platt*, 8 Bosw. 324. **Kansas**: *Cameron v. Marvin*, 26 Kans. 612; *Isenberg v. Fansler*, 13 Pac. Rep. 573. **Maine**: *Hamlin v. Jerrard*, 72 Me. 62, 79. **Mississippi**: *Baldwin v. Flash*, 58 Miss. 593. **Missouri**: *Petring v. Herr Dry Goods Co. (Mo.)* 3 S. W. Rep. 405; *Greeley v. Reading*, 74 Mo. 309.

² *Morrow v. Reed*, 30 Wis. 81, 84.

³ *Frank v. Miner*, *supra*. See § 373.

⁴ See §§ 308-318.

⁵ *Dolan v. Van Demark*, 35 Kans. 304.

⁶ *Jaffray & Co. v. Thompson*, 65 Iowa, 323; *Isenberg v. Fansler*, 36 Kans. 402; *Dolan v. Van Demark*, *supra*.

⁷ *Petring v. Chrisler*, 90 Mo. 649, quoting text; *Dobyns v. Meyer (Mo.)*, 8 S. W. Rep. 251; *Nash v. Norment*, 5 Mo. App. 545; *Greeley v. Reading*, 74 Mo. 309; *Cameron v. Marvin*, 26 Kans. 612, 624; *Pettee v. Dustin*, 58 N. H. 309. The mortgages in these cases were void from a power reserved to the mortgagor to sell. The doctrine of the latter case can hardly be reconciled with the general doctrine on this subject. In the latter case the subsequent change of possession was regarded as a subsequent pledge of the goods independent of the mortgage; and the court remarked that, had the creditor taken possession of the goods merely under and by virtue of his mortgage, the doctrine of *Janvrin v. Fogg*, 49 N. H. 340, 351, that possession under a fraudulent mortgage does not protect the possessor against a subsequent attachment by the mortgagor's creditors, would apply. See §§ 6, 167, 399.

But, on the other hand, if a creditor of the mortgagor levies upon the property before the mortgage is recorded, and before the mortgagee has taken possession, the attachment lien is prior to the mortgage.¹

179. A change of possession of part of the property included in a mortgage not filed as required by a statute will ordinarily protect the mortgage lien as to such part.² But it has been held, under a statute declaring a mortgage void unless duly filed or accompanied by a change of possession of the mortgaged property, that a change of possession of a part of the property does not make the mortgage valid as to such part of the property. A change of possession as to part of the property is not a change of possession of the things mortgaged within the meaning of the statute.³ The statute does not avoid the mortgage merely as to so much of the property as remains in the possession of the mortgagor; but it declares the mortgage itself void, if it be not filed as required by the act, when it is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged.

180. Mortgaged property may be delivered to and kept by an agent of the mortgagee; for delivery to and possession by an agent are in effect delivery to and possession by the principal.⁴ A delivery to a third person for the mortgagee's use is sufficient.⁵ A sufficient delivery of furniture is made by putting it in one room of the house occupied by the mortgagor as a tenant, locking

But see, *contra*, *Blakeslee v. Rossman*, 43 Wis. 116, which was the case of a mortgage void for the same reason. § 409. The mortgagee in this case took possession without the consent of the mortgagor; and it was thought that he could not thus render valid a mortgage which was previously invalid between the parties.

See, in this connection, *Cameron v. Marvin*, 26 Kans. 612, per Valentine, J., where the text of this section is quoted with approval.

¹ *Ramsey v. Glenn*, 33 Kans. 271; 6 Pac. Rep. 265; *Jewell v. Simpson* (Kans.), 16 Pac. Rep. 450; *Tyler v. Safford*, 31 Kans. 608; 3 Pac. Rep. 333; *Wilson v.*

Leslie, 20 Ohio, 161; *Jones v. Graham*, 77 N. Y. 628.

² *Stewart v. Smith* (Iowa, 1882), 14 N. W. Rep. 310.

³ *Benedict v. Smith*, 10 Paige (N. Y.), 126.

⁴ *McPartland v. Read*, 11 Allen (Mass.), 231; *Citizens' Nat. Bank v. Oldham*, 142 Mass. 379; *Wheeler v. Nichols*, 32 Me. 233; *Horner v. Stout*, 5 Colo. 166; *Columbus Iron Works Co. v. Renfro*, 71 Ala. 577, 580; *Jaffray v. Thompson*, 65 Iowa, 323.

⁵ *Jones v. Swayze*, 42 N. J. L. 279; *S. C. 3 N. J. Law J.* 206.

the door, and delivering the key to the owner of the house, to hold until the payment of the mortgaged debt.¹

No particular mode of taking or retaining possession is requisite. No ceremony or formality in order to render the transaction public or notorious is required. It is not necessary that the property be delivered to the mortgagee in person. Delivery to his agent is equally effectual.² No removal of the property from the mortgagor's premises is essential if the mortgagee has actual control of it there. Delivery and possession may in this way be consummated at the mortgagor's place of residence while the property is in use by the mortgagor and his family. Thus, three days before the insolvency of the mortgagor, the mortgagee sent his agent to take possession of the property; the mortgagor pointed it out, and declared that he gave possession of it to the agent in behalf of the mortgagee; and the agent continued in charge of it, upon the premises, uninterruptedly, except on one occasion when he was absent for several hours, until it was seized on a writ of replevin brought against the mortgagee by the assignee in insolvency of the mortgagor. The keeper, by arrangement with the mortgagor, concealed from the family the purpose for which he was present, and permitted them and the mortgagor to use the property as before. Such delivery and possession were held to be legally operative and effectual. The mortgagee's agent had substantial control of the property, and was at all times in such situation that he could maintain the right of his principal to its permanent custody.³

181. Under some circumstances a mortgagee may employ the mortgagor as his agent, to take care of the mortgaged property after he has taken possession of it.⁴ Thus, a bank to which a nursery stock was mortgaged took possession of the property, removed it to another place, and employed the mortgagor as its agent to look after and attend to the property; and it was held that this employment of the mortgagor did not oust the mortgagee of possession.⁵ But a mortgagee's possession would not be suffi-

¹ *McPartland v. Read*, *supra*.

² *McPartland v. Read*, *supra*.

³ *Carpenter v. Snelling*, 97 Mass. 452.

See *Train v. Wellington*, 12 Mass. 495;
Citizens' Nat. Bank v. Oldham, 142 Mass.

⁴ *Turner v. Killian*, 12 Neb. 580, 585,
quoting text; *Ewing v. Merkley*, 3 Utah,
406.

⁵ *Dayton v. People's Savings Bank*, 23
Kans. 421.

cient in case he should merely take a nominal or symbolical delivery of the property from the mortgagor, and should, without doing more, leave it in the mortgagor's charge to hold as his agent;¹ and it would be equally ineffectual if the mortgagee should leave the property in charge of a servant of the mortgagor, and should allow the latter to continue in the apparent possession and enjoyment of the property. Thus, where the mortgaged property, consisting of two billiard tables, kept by the mortgagor for the use of his customers, was permitted to remain in the mortgagor's possession and use, although nominally placed in the charge of his bar-tender, it was held that there was no actual and continued change of possession which would protect the mortgagee in his title.²

But it is not generally competent for the mortgagee to make the mortgagor his agent to hold possession of the mortgaged property.³ Even the appointment of the clerk of the mortgagor as agent of the mortgagee, for the purpose of taking care of and selling a stock of mortgaged goods, where there is no announcement of a change in the business, no change of books, and no change whatever, so far as acts of ownership and possession are concerned, does not constitute a change of possession sufficient to protect the mortgagee's lien.⁴ But it is a question for the jury whether an arrangement made by the mortgagee with the mortgagor's book-keeper was made in good faith with the intent to effect a change of possession and control.⁵ Where the mortgaged property is in the use of a partnership of which the mortgagor is a member, an agreement that his partner shall remain in possession for the mortgagee, followed by a continuance of the partnership in the use of the property, does not amount to an actual change of possession.⁶

If a mortgagee, after taking possession, allows the property to

¹ *Steele v. Benham*, 84 N. Y. 634; reversing *S. C.* 21 Hun, 411; *Otis v. Sill*, 8 Barb. (N. Y.) 102; *Hanford v. Archer*, 4 Hill (N. Y.), 271.

² *Brunswick v. McClay*, 7 Neb. 137.

³ *Pickard v. Marriage*, L. R. 1 Ex. D. 364; *Swiggett v. Dodson* (Kans.), 17 Pac. Rep. 594; *McCarthy v. Grace*, 23 Minn. 182; *Doyle v. Stevens*, 4 Mich. 87; *Brunswick v. McClay*, 7 Neb. 137; *Menzies v.*

Dodd, 19 Wis. 343; *Camp v. Camp*, 2 Hill (N. Y.), 628; *Steele v. Benham*, *supra*. See, however, *Weld v. Cutler*, 2 Gray (Mass.), 195.

⁴ *Doyle v. Stevens*, *supra*.

⁵ *Manufacturers & Traders Bank v. Koch* (N. Y.), 12 N. E. Rep. 9.

⁶ *Porter v. Parmley*, 52 N. Y. 185; overruling *S. C.* 13 Abb. Pr. N. S. 104.

go back into the hands of the mortgagor, the possession of the former is at an end, and the property is liable for the debts of the mortgagor. In South Carolina, where the mortgagor may give a forthcoming bond for the property and hold possession of it, the legal possession is, after giving such bond, regarded as being in the mortgagee, the mortgagor holding only as his bailee.¹

182. What constitutes a change of possession depends much upon the situation of the property.² If it be in the possession or charge of a third person, a substantial change of possession may be made by the mortgagor's pointing out the property, and the mortgagee's constituting such third person his agent, to hold it for him. In such case there is a change of possession without a change of locality. "If property which is not within the actual possession of the owner be sold and delivered to the vendee, leaving it in the place where it was situated is not leaving it in the possession of the vendor, and creditors should not be misled because it remains in the same locality. The very fact that the property is not in the possession of the debtor leads to the inquiry how it is held, and who is the owner; and the fact that the debtor was the owner, and left it at the place where it is found, leads to no legitimate inference that it continues to be his property, when he has not the possession and exercises no acts of ownership over it. To presume, without inquiry, that it remains his, is an unwarrantable presumption."³ Thus, where a mortgage was made of a lot of boards then at the mill-yard of a third person, and the mortgagor's agent went with the mortgagee and pointed them out, and declared that he put the mortgagee in possession, and the latter at the same time told the mill-owner that he would pay for the use of the mill from that time, and did so, it was held that there was an effectual delivery and retention of possession. Another portion of the boards embraced in this mortgage was at a public landing-place, where the mortgagor's agent in the same manner pointed them out to the mortgagee, and the latter requested the keeper of the landing-place to take charge of

¹ *Moody v. Haselden*, 1 S. C. 129.

² *Bismark Building & Loan Ass. v. Bolster*, 92 Pa. St. 123, 129, per Trunkey, J.: "When a removal of the property is impracticable, when all has been done that

reasonably can be to mark the change of ownership and possession, the law is satisfied."

³ *Morse v. Powers*, 17 N. H. 286, per Parker, C. J.

them for him; but the keeper refused to do this, although the mortgagee offered to pay for the use of the landing; yet the delivery and retention of possession were both held sufficient as against a creditor of the mortgagor who attached the property the following day.¹

If the mortgaged goods be stored in a warehouse belonging to the mortgagor, and the mortgagee at once takes possession of the warehouse under a mortgage of that, and retains exclusive possession of the same and of the goods, there is a sufficient delivery and possession of the latter.²

183. If the property be in the possession of a third person, and such third person consent to hold the property as the agent of the mortgagee, the necessity of any actual delivery to and possession by him is superseded.³ But an agreement on the part of the third person in possession of the property to hold it for the mortgagee, or notice to him by the owner so to hold it, is essential to constitute a change of possession.⁴

A mortgagee of an undivided two thirds of a portable engine, which the owner of the other third interest had taken to a foundry for the purpose of repairs, requested the owner of the foundry to look after it for him, and the latter agreed to do so and to retain it for such mortgagee. It was held, in view of the ponderous nature of the property, and its being upon the premises of a third person who claimed no interest in it, that the mortgagee's possession was sufficient.⁵ The engine having been attached by a creditor of the other part-owner, and taken away, it was not essential to the preservation of the mortgagee's rights under his mortgage that he should directly pursue and reclaim the property.⁶

184. There must be some authority conferred upon a third person in possession, or some notice given him to make his possession the possession of the mortgagee. The fact that the property is in the possession of a third person does not always render a change of possession or a delivery unnecessary, and enable the

¹ *Morse v. Powers*, 17 N. H. 286. But see *Menzies v. Dodd*, 19 Wis. 343.

² *Smith v. Skeary*, 47 Conn. 47.

³ *Smith v. Post*, 1 Hun (N. Y.), 516; *S. C.* 3 T. & C. 647; *Goodwin v. Kelly*, 42 Barb. (N. Y.) 194; *Nash v. Ely*, 19

Wend. (N. Y.) 523; *Hodges v. Hurd*, 47 Ill. 363; *Doak v. Brubaker*, 1 Nev. 218; *Wheeler v. Nichols*, 32 Me. 233.

⁴ *Ancona v. Rogers*, 1 Ex. D. 285.

⁵ *Gaar v. Hurd*, 92 Ill. 315.

⁶ *Gaar v. Hurd*, *supra*.

mortgagee to hold it against third persons under a mortgage not recorded or filed. Thus, if a mortgage be made of logs which are in the possession of a boom company, and the mortgagee neither files his mortgage nor receives a delivery of them in any form, nor attempts to obtain possession or control of them, he cannot assert any title to them against a third person who in good faith, and for value paid, first obtains possession of them. The possession of the boom company is really the possession of the mortgagor, and not adverse to him or independent of him. Something of a public nature in the way of a change of possession is necessary, and the mortgagee is not excused from taking such possession as the case allows of.¹

There is a change of possession whenever the mortgagee or vendee assumes control of the property, although there be no removal of the property from the place it has before occupied. Thus, if a mortgagee of a stock of goods receives a delivery of them and puts a third person in charge, who carries on the business and accounts to the mortgagee for the money received, there is an actual change of possession of the goods.²

185. A concurrent possession by the mortgagor and mortgagee is insufficient.³ The change of possession must be apparent to those who have occasion to observe it. Where a farmer conveyed his farm and certain personal property, including a pair of oxen, and took a bond from the grantee conditioned for the support of himself and wife during life and a mortgage on the farm to secure the bond, and the grantor continued to live upon the farm with the grantee, and the personal property, including the oxen, remained upon the farm, and there was no change in the management of the personal property after the conveyance, it was held that there was no change of possession of such property as would protect it from a levy of execution against the mortgagor. There was no substantial change of possession.⁴

186. Constructive possession under a chattel mortgage is ineffectual. The right to possession is by virtue of the contract, and not, as in an execution, by virtue of the law. Possession

¹ *Sheldon v. Warner*, 26 Mich. 403.

³ *Sumner v. Dalton*, 58 N. H. 295;

² *Weaver v. Reilly*, 21 Hun (N. Y.), 585; *Hale v. Sweet*, 40 N. Y. 97; *Griffith v. S. C.* 10 N. Y. Weekly Dig. 241. *Douglass*, 73 Me. 532.

See § 399.

⁴ *Flagg v. Pierce*, 58 N. H. 348.

must be taken in fact; it cannot be taken by words and inspection.¹ It must be actual, open, and public.²

A mortgage of hotel furniture contained a provision that the mortgagor should retain possession until default in payment, or until the property should be seized upon execution or attachment. The mortgagee, upon learning that an execution had been levied upon it, went to the hotel and demanded possession of the mortgagor, who gave him the keys, and went with him through the hotel, opened the doors of the various rooms, and exhibited the furniture. It was arranged between them that the property should be considered as stored for the mortgagee, who took away a napkin as a symbol of the delivery of the whole. It was held that this did not amount to an actual and continued change of possession.³

187. A delivery of ponderous or bulky property by words only is of no effect. There must be some clear, unequivocal, and exclusive change of possession.⁴ The delivery should be such that creditors and subsequent purchasers will not be misled, or left in doubt as to the nature of the transaction.

What is a sufficient change of possession of such articles is a question for the jury. When the property is of a bulky nature, so that only a symbolical delivery can be made, and it is permitted

¹ *Crandall v. Brown*, 18 Hun (N. Y.), 461. And see *Ceas v. Bramley*, 18 Hun (N. Y.), 187; *Fraser v. Gilbert*, 11 Hun (N. Y.), 634; *Nicholson v. Temple*, 4 Pugsley & Bur. N. B. 248; *Swiggett v. Dodson* (Kans.), 17 Pac. Rep. 594.

A mortgage was made of three hundred cords of wood, situate upon the roadside, without any inclosure. The parties went to the place where the wood was piled, and the mortgagor said to the mortgagee: "There is the wood. I deliver it to you as security for the money loaned." The wood was not marked, and no person was put in charge of it. Once each day for a week after mortgage the mortgagee went to the place where the wood was piled to see that it was not interfered with; and afterwards went from one to three times a week for the same purpose, until the wood was attached as the property of the

mortgagor. It was held that the delivery and possession were not sufficient to make the mortgage valid. *Wilson v. Hill*, 17 Nev. 401.

² *Steele v. Benham*, 84 N. Y. 634; *Topping v. Lynch*, 2 Rob. (N. Y.) 484; *Manufacturers' Bank v. Rugee*, 59 Wis. 221.

³ *National Bank v. Sprague*, 20 N. J. Eq. 13; and see *Porter v. Parmley*, 52 N. Y. 185.

⁴ *Anderson v. Brenneman*, 44 Mich. 198; *S. C.* 6 N. W. Rep. 222; *Doak v. Brubaker*, 1 Nev. 218; *Menzies v. Dodd*, 19 Wis. 343. The mortgage in the latter case was of several stacks of wheat, which were delivered by pointing them out to the mortgagee. This case seems to be substantially overruled by *Morrow v. Reed*, 30 Wis. 81. See *Weld v. Cutler*, 2 Gray (Mass.), 195.

to remain in a place where the possession may be equivocal, and doubts exist as to the sufficiency of the possession, it is said they should be solved in favor of the purchaser or creditor, and against the mortgagee, because he had the power to protect himself by filing or recording his mortgage and neglected to do so.¹

A delivery of such articles sufficient to render an unrecorded mortgage of them valid against third persons is such a delivery as would be necessary as against third persons in case of an absolute sale of those chattels.² The nature of the delivery and subsequent possession must depend upon the bulk and character of the property. A delivery and possession of such property as unfinished steam-engines sufficient to protect the mortgagee would be quite insufficient in case the property were not of great bulk and could be readily taken up and removed.³

Where a mortgage was made of household furniture which was at the time locked up in a store-room, the key of which the mortgagor delivered to the mortgagee, who put a new lock upon the room and kept the key in his sole possession, it was held that these facts justified the jury in finding that there was a change of possession.⁴

It has been held to be a sufficient delivery of a large quantity of logs for the mortgagor to go with the mortgagee to the place where they lie, and point them out as the property included in the mortgage, and declare that he thereby transfers them to the mortgagee's possession.⁵

Where the property mortgaged consisted of growing crops, the possession was considered to be in the mortgagee until the time of harvesting them, and until then he was not required to take manual possession of them.⁶

¹ *Anderson v. Brenneman*, 44 Mich. 198; *S. C.* 6 N. W. Rep. 222.

² *Wright v. Tetlow*, 99 Mass. 397.

³ See *Wright v. Tetlow*, *supra*, for circumstances under which a clerk of the mortgagor received and retained possession of such property for the mortgagee.

⁴ *Giffert v. Wilson*, 18 Bradw. (Ill.) 214; and see *Benford v. Schell*, 55 Pa. St. 393; *Chappel v. Marvin*, 2 Aiken (Vt.), 79.

⁵ *Morrow v. Reed*, 30 Wis. 81. See, however, *Menzies v. Dodd*, 19 Wis. 343.

⁶ *Ticknor v. McClelland*, 84 Ill. 471; *Bull v. Griswold*, 19 Ill. 631; *Thompson v. Wilhite*, 81 Ill. 356. But in the later case of *Gittings v. Nelson*, 86 Ill. 591, it was held that an agreement made in the spring, before the existence of a crop, to give a lien upon it when raised, to secure advances, could not operate upon the crop after being raised as a transfer by way of pledge or mortgage, until the creditor should take possession; and that previous to such possession the crop would be liable to execution against the debtor.

188. A delivery is not complete so long as anything remains to be done as a condition precedent to the passing of the title, such as the measurement of a certain quantity of lumber out of a larger quantity piled together.¹ But no such measurement is necessary if the lumber transferred be piled by itself, and possession of the whole be delivered.² And so if a mortgage be made of four hundred tons of coal, part of a larger pile on the mortgagor's wharf, and the mortgagee takes possession of the whole with the assent of the mortgagor and sells a part of it, the delivery is sufficient to vest the title in the mortgagee, who may hold the whole pile against the assignee in insolvency of the mortgagor, until the mortgagee has had sufficient time and opportunity to separate and remove the quantity mortgaged.³

189. The burden to prove a delivery or change of possession is upon the person who claims to hold the property by virtue of an unrecorded mortgage.⁴

¹ *Frost v. Woodruff*, 54 Ill. 155; *Seckel v. Scott*, 66 Ill. 106.

² *Tyler v. Strang*, 21 Barb. (N. Y.) 198. In *Crofoot v. Bennett*, 2 N. Y. 258, it was held that a delivery of a brick-yard, upon a sale of a portion of the bricks by the thousand, not counted or marked, passed the property in those sold; and that it was left to the vendee to make his own selection. And see *Bullock v. Williams*, 16 Pick. (Mass.) 33.

³ *Weld v. Cutler*, 2 Gray (Mass.) 195. Mr. Justice Bigelow, delivering the judgment of the court in this case, said: "The property in the part mortgaged passed, it being left to the mortgagee to select and separate it from the whole, which was placed in his possession and control for that purpose. Under such circumstances, it is very clear that neither the mortgagor, nor those claiming under him, could dispute the right of the plaintiff to hold the entire property, until the object for which its possession was delivered to him should have been accomplished. The right of possession of the entire bulk had become

legally vested in the mortgagee for a lawful purpose; neither the mortgagor nor his assigns had the possession or the right to the immediate possession of it; neither of them, therefore, could maintain trespass or trover against the mortgagee; nor could a creditor of the mortgagor, by attachment on mesne process, or seizure on execution, disturb a possession thus acquired. The power to hold the whole property by the mortgagee was coupled with an interest in him, which neither the mortgagor nor his creditors could defeat. The right of all persons claiming title under the mortgagor, to the property not included in the mortgage, must be taken to be subordinate to the right, previously acquired by the mortgagee, of holding the whole in his possession until, by the use of due and reasonable diligence, he had separated and taken out the portion mortgaged to him." *Distinguished from Scudder v. Worster*, 11 Cush. (Mass.) 573.

⁴ *McCarthy v. Grace*, 23 Minn. 182; *Swiggett v. Dodson* (Kans.), 17 Pac. Rep. 594.

CHAPTER VI.

STATUTORY PROVISIONS RELATING TO RECORDING, FILING, AND REFILING.

190. In almost all the states and territories of the United States,¹ statutes have been enacted for the purpose of enabling mortgagors to retain possession of the mortgaged chattels, and at the same time to give mortgages which shall secure their creditors as effectually as if the latter had received and retained actual possession of the property. This purpose is accomplished by substituting a record or filing of mortgages in place of a delivery of possession of the mortgaged property. The statutes in effect make a recording or filing of the instrument equivalent to a change of possession of the property.²

But while the statutes agree in the object to be attained, they differ widely in their mode of accomplishing it. In some states it is provided that the instrument shall be recorded at length, while in others the instrument is placed upon file, with an indorsement thereon of the time when it was received, without any record being made other than an index of the names of the parties, and perhaps a note of the time of filing.

Inasmuch as personal property is movable and has no fixed and permanent location, but is for most purposes considered as following the person of the owner, the statutes have generally provided that a mortgage of such property shall be recorded in the town or county of the mortgagor's residence. In many states it is provided that in case the mortgagor be a non-resident of the state, the mortgage shall be recorded in the county or town in which the prop-

¹ The only states in which there is no general system of recording or filing mortgages of personal property are **Pennsylvania** and **Louisiana**. In a few other states, as has already been noticed, chattel mort-

gages can be given of only certain specified articles. See § 121.

² *Crooks v. Stuart*, 2 McCrary, 13. See, however, § 236, last paragraph.

erty may be at the time the mortgage is executed.¹ In several states it is provided that a mortgage of personal property shall be recorded not only in the county in which the mortgagor resides, but also in that in which the property is located.² But in other states such mortgage need be recorded only in the county in which the property is situated at the time the mortgage is made.³

In addition to the record so provided, for, either at the place of residence of the mortgagor or where the property is situated, in a few states it is further provided, that in case the property be afterwards removed to another county the mortgage shall also be recorded in that county.⁴

In some states a record ceases to be of any effect after a limited period from the original filing of the mortgage.⁵ But provision is made in several states for a refiling of the mortgage.⁶

There are other differences in the provisions of the statutes of the several states. In short, the statutes are so different in details that no adequate statement of their provisions can be made except by giving in full the statute of each state and territory; and inasmuch as these statutes lie at the foundation of the whole superstructure of the modern law of chattel mortgages, a full and accurate statement of their provisions is regarded as not less important than a statement of the decisions of the court.

¹ Such is the case in the states of
 Illinois, North Carolina,
 Kansas, Rhode Island,
 Maine, South Carolina,
 Massachusetts, Tennessee,
 Michigan, Texas,
 Nebraska, Utah Territory,
 New Hampshire, Vermont, and
 New Jersey, Wisconsin.
 New York,

² Such is the case in the states of
 Alabama, Georgia,
 Arizona T., Minnesota, and
 California, Nevada.

³ Such is the case in the states of
 Colorado, New Mexico,
 Connecticut, Ohio,
 Dakota T., Virginia,
 Delaware, Washington Ter-
 ritory,
 Florida, West Virginia, and
 Idaho Territory, Wyoming Terri-
 Kentucky, tory.
 Mississippi,

⁴ Such is the case in the states of
 Alabama, Mississippi, and
 California, Wyoming Terri-
 Idaho Territory, tory.

⁵ In Colorado and Minnesota this period is two years; in Montana Territory, one year; and in Nebraska, five years. In Wyoming Territory the period is two months after the term for which the mortgage was given. In Illinois a mortgage is good only till the maturity of the debt, not exceeding two years from the filing.

⁶ As in the states of
 Arkansas, New Mexico,
 Kansas, New York,
 Michigan, Ohio, and
 Minnesota, Oregon,

at the expiration of one year; in Wisconsin, at the expiration of two years; and in Dakota Territory, at the expiration of three years.

191. *Alabama*.¹ — Conveyances of personal property to secure debts, or to provide indemnity, must be recorded in the county in which the grantor resides, and also in the county where the property is, at the date of the conveyance ;² and if before the lien is satisfied the property is removed to another county, the conveyance must be again recorded, within six months from such removal, in the county to which it is removed.³ Whenever any personal property is subject to any lien, incumbrance, mortgage, or trust, for the security of debts, at the time of its removal to this state, the writing evidencing the lien, incumbrance, mortgage, or trust must be recorded, in the county into which it is brought and remains, within four months of the arrival of such property.⁴ Things in action are not included in the words “personal property.”

Conveyances of personal property to secure debts, or to provide indemnity, are inoperative, against creditors and purchasers without notice, until recorded, unless the property is brought into this state subject to such incumbrance, in which case four months are allowed for the registration of the conveyance ; and if such property is removed to a different county from that in which the grantor resides, the conveyance must be recorded in such county within six months from the removal, or it ceases to have effect, after such six months, against creditors or purchasers of the grantor without notice. This provision includes absolute convey-

¹ Code 1886, §§ 1806-1808, 1814, 1815.

No acknowledgment or proof of execution is necessary to a valid registration. A mortgage of personalty admitted to record without acknowledgment operates as constructive notice, in the same manner as if acknowledgment had been made. Code 1876, § 2153 ; *Bickley v. Keenan*, 60 Ala. 293.

² If the mortgaged property has a fixed *situs* in the state at the time of the execution of the mortgage, although the parties to it be non-residents, it does not protect the property as against the mortgagor's creditors until it is recorded here. *Hardaway v. Semmes*, 38 Ala. 657.

³ If the property does not remain in the county to which it is removed for the period of six months, the mortgage need not be recorded in that county. The first

registration does not lose its effect till the expiration of six months. In case of successive removals, a new registration is not required unless the property remains in one county, to which it is removed, for a period of six months. *Wilkinson v. King*, 81 Ala. 156.

⁴ Whenever any person, having an estate for life or years in personal property, removes to this state with such property, the conveyance creating such estate must be recorded in the county to which it was brought, within twelve months thereafter ; and if such property is removed to another county, then in such county within four months after its removal thereto ; or such property must be taken to vest absolutely in such person as to purchasers and creditors without notice. Code 1886, § 1808.

ances of personal property, defeasible by a defeasance or other instrument; and in such case the defeasance must be recorded, or the same is void as to creditors and purchasers from the grantee without notice.

192. Arkansas.¹—A mortgage of personal estate must be proved or acknowledged in the same manner that deeds for the conveyance of real estate are now required to be proved or acknowledged, and recorded in the recorder's office in the county in which the mortgagor resides.² It is a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; the filing is notice to all persons of the existence of such mortgage.

Any mortgage or conveyance intended to operate as a mortgage of personal property, or every deed of trust upon personal property, filed with any recorder, upon which are indorsed the following words, "This instrument is to be filed but not recorded," signed by the mortgagee, his agent or attorney, when so received shall be marked "filed" by the recorder, with the time of filing, upon the back of such instrument, and he shall file the same in his office, and it shall be a lien upon the property therein described from the time of filing, and the same shall be kept there for the inspection of all persons interested;³ and said instrument is thenceforth notice to all the world of the contents thereof, without further record, except as follows:—

Every mortgage so indorsed and filed is void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless within thirty days next preceding the expiration of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make

¹ Dig. of Statute 1884, §§ 4742-4744, 4750-4753. An attachment lien is superior to an unregistered mortgage *Main v. Alexander*, 9 Ark. 112; *Ringo v. Wing* (Ark.), 5 S. W. Rep. 787.

² A corporation can have no legal residence out of the sovereignty by which it was created, and therefore a foreign corporation cannot give a valid mortgage, which is required to be recorded in the

county in which the mortgagor resides. *Watson v. Thompson Lumber Co.* (Ark.), 4 S. W. Rep. 62.

³ Indorsement "to be filed but not recorded" sufficient. *State v. Smith*, 40 Ark. 431. Putting the instrument in the place in the office where unrecorded mortgages are kept "for record," is an effectual recording, though not marked. *Case v. Hargadine*, 43 Ark. 144.

an affidavit exhibiting the interest of the mortgagee at the time last aforesaid, claimed by virtue of such mortgage;¹ and if said mortgage is to secure the payment of money, the amount yet due and unpaid; and such affidavit shall be attached to and filed with the instrument or copy on file to which it relates.²

In the absence of stipulations to the contrary, the mortgagee of personal property has the legal title and the right of possession.

193. Arizona Territory.³ — Every chattel mortgage, deed of trust, or other instrument of writing intended to operate as a mortgage of or lien upon personal property, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making the same, and as against subsequent purchasers and mortgagees or lien-holders in good faith, unless such instrument or a true copy thereof shall be forthwith deposited with and filed in the office of the county recorder of the county where the property shall then be situated; and if the mortgagor or person making the same be a resident of this territory, then it shall also be recorded in the county of which he shall at the time be a resident. The instrument need not be recorded at length, but the record is effectual when it is deposited and filed.

Every person claiming title under any deed, mortgage, or other writing respecting the title to personal property, who shall permit

¹ The mortgage, after the lapse of a year from the filing, unless it is extended, is void as to creditors, subsequent mortgagees, and purchasers, although they have notice of the mortgage. *McKennon v. May*, 39 Ark. 442.

² A copy of any such original instrument, so indorsed and filed, including any affidavit made in pursuance of this act, certified by the recorder in whose office the same shall have been filed, shall be received in evidence in all suits or proceedings to which it may be applicable; and if, in any suit or proceeding, the execution of said instrument, or its genuineness, shall be questioned in such manner as to render the production of the original

necessary, the same may be produced by the recorder of the county in obedience to a subpoena *duces tecum*, or other proper process.

The recorder shall keep a book in which shall be entered a minute of mortgages and trust deeds of personal property and of the affidavits filed, indicating in separate columns the time of reception, names of the parties, date of the instrument, amount secured, when due, the property mortgaged, by general description of the property and place where located, and also the date of filing of any affidavit with the amount sworn to be due and unpaid.

³ R. S. 1887, §§ 2365, 2371, 2372.

any other person, in whose possession such property may be, to remove the same, or any part thereof, out of the county in which the same shall be recorded, and shall not, within one month after such removal, cause the same to be recorded in the county to which such property shall be removed, such deed, mortgage or other writing, for so long as it shall not be recorded in such last-mentioned county, and for so much of the property aforesaid as shall have been removed, shall be void as to all creditors and purchasers thereof for valuable consideration without notice.

194. California.¹— Every mortgage must be recorded in the office of the county recorder of the county in which the mortgagor resides, and also of the county in which the property mortgaged is situated, or to which it may be removed. Property in transit from the possession of the mortgagee to the county of the residence of the mortgagor, or to a location for use, is, during a reasonable time for such transportation, taken as situated in the county in which the mortgagor resides, or where it is intended to be used. For a like purpose, personal property used in conducting the business of a common carrier is to be taken as situated in the county in which the principal office or place of business of the carrier is located.

A single mortgage of personal property, embracing several things of such character, or so situated that separate mortgages upon them would be required to be recorded in different places, is only valid in respect to the things as to which it is duly recorded.

Mortgages of personal property must be recorded in books kept for personal mortgages exclusively. A certified copy of a mortgage of personal property once recorded may be recorded in any other county, and when so recorded the record thereof has the same force and effect as though it was of the original mortgage.

When personal property mortgaged is thereafter by the mortgagor removed from the county in which it is situated, it is, except as between the parties to the mortgage, exempted from the operation thereof, unless either the mortgagee, within thirty days after such removal, causes the mortgage to be recorded in the county to which the property has been removed, or the mortgagee, within thirty days after such removal, takes possession of the

¹ 1 Codes & Stats. 1876, §§ 7959-7966.

property. If the mortgagor voluntarily removes or permits the removal of the mortgaged property from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt be not due.

These provisions do not apply to vessels of the United States.¹

195. In Colorado² it is provided that no mortgage on personal property shall be valid as against the rights and interests of any third person or persons, unless possession of such personal property shall be delivered to and remain with the mortgagee,³ or the mortgage be acknowledged and recorded as directed. Any such mortgagor shall acknowledge such mortgage before some officer authorized to take acknowledgment of deeds to real estate in this state;⁴ said officer shall certify the same as follows: "This mortgage was acknowledged before me by A. B. this day of , 188 ." Any mortgage of personal property, so certified, shall be admitted to record by the recorder of the county wherein the property mortgaged, or the greater part thereof, shall be situated,⁵ and shall thereupon, if *bonâ fide*, be good and valid from the time it is so recorded. Until the maturity of the last instalment of the mortgage indebtedness, but not exceeding two years if the principal of said mortgage indebtedness does not exceed twenty-five hundred dollars; and not exceeding five years, if the principal of the mortgage indebtedness be more than twenty-

¹ Under an earlier statute of California (Laws 1850, p. 267) it was provided that no mortgage should be valid except between the parties to it, unless possession should be delivered and retained by the mortgagee. The possession required under this statute was actual possession continued so long as the lien was retained. *Woods v. Bugbey*, 29 Cal. 466; *Stevens v. Irwin*, 15 Cal. 503, 506; *Godchaux v. Mulford*, 26 Cal. 316, 323; *Regli v. McClure*, 47 Cal. 612; *O'Brien v. Chamberlain*, 50 Cal. 285. But under the Code now in force, possession is only required to accompany transfers of personal property other than mortgages. Civil Code, § 3440. Recording is equivalent to delivery and continued change of possession. *Berson v. Nunan*, 63 Cal. 550.

² G. S. 1883, §§ 163, 172; Laws 1887, p. 75.

³ A mortgage without this provision cannot be received in evidence. *Machette v. Wanless*, 1 Colo. 225.

⁴ Under this provision a non-resident, whether a person or a corporation, cannot execute a valid mortgage. A foreign corporation does not become a domestic corporation and acquire a residence in the state by complying with the laws of the state, in pursuance of which a foreign corporation may do business without liability attaching to its stockholders and officers. The residence of the corporation still remains in the state or country to whose laws it owes its existence. *Cook v. Hager*, 3 Colo. 386.

⁵ See *Tabor v. Sampson*, 7 Colo. 426.

five hundred dollars and not more than twenty thousand dollars; and not exceeding ten years, if the principal of the mortgage indebtedness exceeds twenty thousand dollars, notwithstanding the property mortgaged or conveyed by deed of trust be left in the possession of the mortgagor; provided that such conveyance provides that the property so remain with the mortgagor; and provided, further, that if such mortgage be given to secure a sum greater than two thousand five hundred dollars, there shall be recorded annually, on the records of the county wherein such mortgage shall have been recorded, a sworn statement of the mortgagee, or one of the mortgagees if there be more than one, showing, first, that said mortgage was given in good faith to secure the payment of the sum of money mentioned therein; second, that said sum of money is still unpaid; or, if a portion thereof shall have been paid, then how much thereof, if any, remains unpaid.¹

These provisions extend to all such bills of sale, deeds of trust, and other conveyances of personal property, as have the effect of a mortgage or lien upon such property.

Any person who may buy, or otherwise obtain any interest in, any personal property which is mortgaged in pursuance of these provisions, but the mortgage of which has not been recorded, and with actual notice of such mortgage, shall be deemed and considered to have bought or obtained such interest in such property, subject to such mortgage, the same as though such mortgage had been properly recorded.²

196. Connecticut.³—Mortgages can be made of particular articles of personal property, either in connection with the real estate upon which they are located, or separate therefrom; and in either case, when executed, acknowledged, and recorded in

¹ A copy of any such mortgage, made, acknowledged, and recorded as provided, certified by the recorder of any county wherein the same is recorded, may be read in evidence in any court of this state, without any further proof of the execution of the original thereof, if it shall appear from the affidavit or sworn statement of any credible witness that the original is lost, or that it is not in the power of

the person wishing to use the same to produce it.

² This provision does not dispense with any of the requisites to the validity of a mortgage, except the recording thereof when the adverse party has actual notice. Therefore a mortgage without an acknowledgment has no effect upon the rights of third parties acting in good faith. *Crane v. Chandler*, 5 Colo. 21.

³ G. S. 1888, § 3016.

the same manner as is a mortgage of real estate, the retention by the mortgagor of the possession of such property shall not impair the title of the mortgagee. A mortgage is not effectual against any other person than the mortgagor and his heirs, unless recorded in the records of the town in which the property is situated.

197. *Dakota Territory.*¹ — A mortgage of personal property is void as against creditors of the mortgagor, and subsequent purchasers and incumbrancers of the property in good faith for value, unless the original, or an authenticated copy thereof, be filed, by depositing the same in the office of the register of deeds of the county where the property mortgaged, or any part thereof, is at such time situated. The filing of a mortgage of personal property operates as notice thereof to all subsequent purchasers and incumbrancers of so much of the property as is at the time situated in the county in which such mortgage or authenticated copy is filed. Property in transit from the possession of the mortgagee to the county of the residence of the mortgagor, or to a location for use, is, during a reasonable time for transportation, to be taken as situated in the county in which the mortgagor resides, or where it is intended to be used. For a like purpose, personal property used in conducting the business of a common carrier is to be taken as situated in the county in which the principal office or place of business of the carrier is located.

A single mortgage of personal property, embracing several things of such character, or so situated, that separate mortgages upon them would be required to be filed in different counties, is only valid in respect to the things as to which it is duly filed; but a copy of the original mortgage may be authenticated by the register of deeds in whose office it is filed, and such copy may be filed in any other county with the same effect as to the property therein that the original could have been.

A mortgage of personal property ceases to be valid, as against creditors of the mortgagor and subsequent purchasers or incumbrancers in good faith, after the expiration of three years from the filing thereof, unless, within thirty days next preceding the expiration of such term, a copy of the mortgage and a statement of the amount of existing debt for which the mortgagee or his

¹ R. C. 1883; §§ 1744–1752 of Civil Code.

assignee claims a lien, sworn to and subscribed by him, his agent or attorney, are filed anew in the office of the register of deeds in the county in which the mortgagor then resides. And in like manner the mortgage and statement of debt must be again filed every three years, or it ceases to be valid as against the parties above mentioned.

A mortgage is not to be deemed defectively filed by reason of any errors in the copy filed which do not tend to mislead a party interested; and the negligence of the officer with whom a mortgage is filed does not prejudice the rights of the mortgagee.

198. Delaware.¹ — A *bonâ fide* mortgage of personal property, if duly signed, sealed, and delivered by the party making it, and acknowledged as mortgages of real property are, shall for the space of three years be a valid lien upon such personal property, though the possession remain in the mortgagor, if it be lodged for record in the recorder's office of each county where any of the mortgaged property is held, within ten days from the time of the acknowledgment thereof. It shall be no objection to a mortgage of chattels that the same or any of them are already subject to execution or mortgage lien.

199. Florida.² — No mortgage of personal property shall be effectual or valid to any purpose whatever, unless it be recorded in the office of records for the county in which the mortgaged property shall be at the time of the execution of the mortgage, unless the mortgaged property be delivered at the time of execution of the mortgage, or within twenty days thereafter, to the mortgagee, and shall continue to remain truly and *bonâ fide* in his possession; and mortgages of personal property shall be admitted to record, upon proof of the execution thereof being made and exhibited to the recording officer, in any of the ways prescribed for proving the execution of conveyances, transfers, and mortgages of real property,³ or by proof being made upon oath by at least one credible person, before the recording officer, of the handwriting of the mortgagor or mortgagors, in cases in which there shall be no attesting witnesses to the mortgage.

¹ Laws 1877, ch. 477, §§ 1, 3, 4.

² Bush's Dig. of Laws, p. 153, § 19; Dig. Laws 1881, ch. 31, § 1.

³ See Jones on Mortgages, § 489.

200. Georgia.¹ — Mortgages of personalty must be recorded in the county where the mortgagor resided at the time of its execution, if a resident of this state; if a non-resident, then in the county where the mortgaged property is. If a mortgage be executed on personalty not within the limits of this state, and such property is afterwards brought within the state, the mortgage shall be recorded, according to the above rules, within six months after such property is so brought in.

All chattel mortgages of stocks of goods, wares, and merchandise, or other personal property, shall be recorded, in case the same is upon property or goods located in some other county than that of the mortgagor's residence, in the county where said goods or personal property is located at the time of the execution of said mortgage, in addition to the record of said mortgage in the county of the mortgagor's residence.

Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage. If, however, the younger lien is created by contract, and the party receiving it has notice of the prior unrecorded mortgage, or a purchaser has the like notice, then the lien of the older mortgage shall be held good against them.

Mortgages when duly executed and recorded shall be admitted in evidence under the same rules as registered deeds.

A mortgage recorded in an improper office, or without due attestation or probate, or so defectively recorded as not to give notice to a prudent inquirer, shall not be held notice to subsequent *bond fide* purchasers or younger liens. A mere formal mistake in the records shall not vitiate it.

The due record of a mortgage, though not made in the time prescribed, is notice from the time of record to all the world.²

201. Idaho Territory.³ — Mortgages of personal property must be recorded in the office of the county recorder of the county in which the mortgaged property is situated, in a book kept

¹ Code 1873, and Code 1882, §§ 1955-1960.

² A mortgage recorded within the time limited takes effect from the time of its execution; and it takes effect in like manner if it be proven by the subscribing wit-

ness and recorded within the time limited. *Nichols v. Hampton*, 46 Ga. 253. It is immaterial whether a witness signed individually or officially as notary public. *Janes v. Penny*, 76 Ga. 796.

³ R. S. 1887, §§ 3387, 3388, 3398.

exclusively for that purpose: provided, that property in transit from the possession of the mortgagee to the county in which the mortgagor resides, or to a location for use, shall, for a reasonable length of time for such transportation, be considered as located in the county to which the same is being removed: provided further, that if the mortgagee receive and retain actual possession of the property mortgaged, he may omit the recording of his mortgage during the continuance of such actual possession.

When mortgaged personal property is thereafter removed from the county wherein it was situated at the time of the execution of the mortgage, by the written consent of the mortgagee, it is, except as between the parties to the mortgage, exempt from the operation thereof, unless either, first, the mortgagee, within ten days after such removal, cause the mortgage to be recorded in the county to which the property has been removed; or, second, the mortgagee, within ten days after such removal, take possession of the mortgaged property.

The mortgagee is allowed one day for every twenty miles or fraction thereof of the distance between his residence and the county recorder's office where such mortgage is to be recorded, to conform to these provisions, before any subsequent incumbrance, sale, or seizure, under any process, is effectual to hold or bind the mortgaged property.

202. Illinois.¹—No mortgage, trust deed, or other conveyance of personal property having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded; and every such instrument is deemed a chattel mortgage. Such instrument shall be acknowledged before a justice of the peace of the town or precinct where the mortgagor resides, or, if there be no acting justice of the peace in the town or precinct where the mortgagor resides, then such instrument may be acknowledged before the county judge of the county in which the mortgagor resides; or, if the mortgagor

¹ R. S. 1874, and R. S. 1880, ch. 95, applicable to an ordinary railroad mortgage. *Hammock v. Loan and Trust Co.* §§ 1-5; Annot. Stat 1885, ch. 95, §§ 1-5; *Hammock v. Loan and Trust Co.* Laws 1887, p. 241. This statute is in- 105 U. S. 77.

is not a resident of the state at the time of making the acknowledgment, then before any officer authorized by law to take acknowledgments of deeds.¹

If the acknowledgment is of a resident of the state, the justice of the peace shall enter in his docket a memorandum thereof.²

¹ The certificate of acknowledgments may be in the following form:—This (name of instrument) was acknowledged before me by (name of grantor) (when the acknowledgment is by a resident, insert the words "and entered by me") this day of _____, 18 .

(Name of officer.) (Seal.)

An acknowledgment to be valid must be made before a justice of the peace of the town or election district in which the mortgagor resides. *Henderson v. Morgan*, 26 Ill. 431; *Stephenson v. Browning*, 48 Ill. 78; *Ticknor v. McClelland*, 84 Ill. 471; *McDowell v. Stewart*, 83 Ill. 538; *Wright v. Smith*, 82 Ill. 527; *Harvey v. Dunn*, 89 Ill. 585. If the acknowledgment be before a justice of the peace residing in the same township or precinct with the mortgagor, it is good if taken anywhere in the county. It is immaterial that the justice has his office and keeps his docket in an adjoining township but a few rods away, where it is readily accessible for inspection. *Durfee v. Grinnell*, 69 Ill. 371. An acknowledgment made at the office of the magistrate by a mortgagor living in the county where the office was, but not in the county in which the magistrate resided, was held good, as being made before an officer *de facto*. *Nelson v. Kessinger*, 16 Bradw. Ill. 185. An acknowledgment by one of several partners or joint owners in the justice's district where such owner resides, and in which the property is situated, is sufficient. *Funk v. Staats*, 24 Ill. 632. Acknowledgment may be made before a police magistrate. *Herkelrath v. Stookey*, 58 Ill. 21; *Ticknor v. McClelland*, *supra*. An error of a year in dating the certificate of acknowledgment, which does not result in an injury to any one, does not vitiate the mortgage. *Durfee v. Grinnell*, *supra*.

A mortgage not acknowledged is void as to subsequent purchasers and mortgagees, notwithstanding the latter became such with actual notice of such elder mortgage. *Sage v. Browning*, 51 Ill. 217; *Frank v. Miner*, 50 Ill. 444; *Porter v. Dement*, 35 Ill. 478; *Forest v. Tinkham*, 29 Ill. 141. The statute declares such a mortgage void as to all third parties, and not merely void as to subsequent parties without notice. *Sage v. Browning*, *supra*, per Lawrence, J.

An entry of the acknowledgment in the docket of the justice is essential to its validity as to third persons. *Koplin v. Anderson*, 88 Ill. 120. The entry may be made in a special docket kept for that purpose. *Pike v. Colvin*, 67 Ill. 227.

The omission of the words, "and entered by me," does not render the acknowledgment subject to objection, if in fact the justice made entry upon his docket as required. *Harvey v. Dunn*, 89 Ill. 585; *Schroder v. Keller*, 84 Ill. 46.

² Substantially as follows:—

A. B. (name of the mort- } Mortgage of
gagor) to C. D. (name of } (here insert
mortgagee). } description
of the property mortgaged), acknowledged
this day of _____, 18 .

Docket Entry.

The failure of a justice of the peace taking the acknowledgment of a mortgage to enter a memorandum thereof upon his docket, as required by law, renders the mortgage invalid as to subsequent purchasers and creditors of the mortgagor. Such entry is an essential part of the acknowledgment. *Koplin v. Anderson*, *supra*. If the justice fails to make such entry, he is, without doubt, liable to any one who is thereby injured for the damage occasioned by such neglect. *Harlow v.*

Such mortgage, trust deed, or other conveyance of personal property duly acknowledged, shall be admitted to record by the recorder of the county in which the mortgagor resides at the time when the instrument is executed and recorded; or, in case the mortgagor is not a resident of this state, then in the town where the property is situated and kept; and shall thereupon, if *bonâ fide*, be good and valid from the time it is filed for record until the maturity of the entire debt or obligation, provided such time shall not exceed two years,¹ unless, within thirty days next preceding the maturity of the note or obligation for which such instrument or mortgage is given to secure, the mortgagor and mortgagee, his or their agent or attorney, shall file for record an affidavit setting forth particularly the interest which the mortgagee has by virtue of such mortgage in the property therein mentioned, and, if such mortgage is for the payment of money, the amount remaining due and unpaid therein, and the time for which the said mortgage is extended, which said extension shall not exceed a further term of two years, upon which affidavit the clerk shall indorse the time when the same was filed; and the said mortgagee shall also, within the said preceding thirty days, file a certified copy of said affidavit with the justice of the peace before whom said mortgage was acknowledged, or his successor in office, and thereupon the mortgage lien originally acquired shall be continued and extended for and during the term of such extension.

Birger, 30 Ill. 425. The objection to a chattel mortgage, that no memorandum was made in the justice's docket, must be urged in the court below, or it will not be considered in the Supreme Court. Funk v. Staats, 24 Ill. 632. In the absence of proof to the contrary, it will be presumed that the justice has entered in his docket the inventory required by law. Harlow v. Birger, 30 Ill. 425. The entry of the memorandum of the acknowledgment of a chattel mortgage in a special docket kept for that purpose by the justice of the peace, instead of in his general docket, is a substantial and sufficient compliance with the statute. Pike v. Colvin, 67 Ill. 227. The law does not require that any certificate of the entry on the justice's docket of a memorandum of the acknowl-

edgment of the chattel mortgage shall be attached to the mortgage. Harlow v. Birger, *supra*; Schroder v. Keller, 84 Ill. 46; Harvey v. Dunn, 89 Ill. 585.

In making the entries required, this justice acts as a ministerial officer, and is liable for failure to comply with the statute. People v. Hamilton, 17 Bradw. 599; Harlow v. Birger, *supra*.

¹ A mortgage having a longer time than two years to run is good and valid against creditors and purchasers for the period of two years, if it contain a provision that the property may remain in the mortgagor's possession, and otherwise it be duly executed and recorded. Cook v. Thayer, 11 Ill. 617; and see Reed v. Eames, 19 Ill. 594; Greenebaum v. Wheeler, 90 Ill. 296, 298.

A copy of such instrument so made, acknowledged, and recorded, and certified by the proper recorder, may be read in evidence.

203. Indiana.¹ — No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged,² as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof.³ Every such mortgage shall be considered as recorded from the time it shall be left at the proper recorder's office for that purpose.

204. Iowa.⁴ — No sale or mortgage of personal property where

¹ 1 R. S. 1876, p. 405, § 10; R. S. 1881, §§ 4913, 4914. Prior to 1838 there was no statute in this state authorizing the recording of chattel mortgages, and therefore their validity up to that time was determined by the common law rules and the statute of frauds. *Jordan v. Turner*, 3 Blackf. 309; *S. C. 11 Cent. L. J. 143*.

² The acknowledgment is not invalidated by the notary's using a plain seal not his own. *Muncie Nat. Bank v. Brown*, 112 Ind. 474.

³ The time when a chattel mortgage was left at the recorder's office for record may be shown by parol, inasmuch as there is no law requiring the recorder to make any record or memorandum of the time when such a mortgage was left at his office for record. *Holman v. Doran*, 56 Ind. 358.

If not recorded within that time it is not effectual against purchasers in good faith. *Briggs v. Fleming*, 112 Ind. 313; 14 N. E. Rep. 86.

The time within which the mortgage is to be recorded is computed by excluding the day on which it was executed, and including that on which it was recorded. *Towell v. Hollweg*, 81 Ind. 154. Inasmuch as a mortgage does not take effect until it is accepted, it is sufficient if it be

recorded within ten days from such acceptance. *Eaton v. McKahan*, 91 Ind. 109.

Inasmuch as the statute provides for the recording of the mortgage "within ten days from the execution thereof," and not within ten days from the date thereof, the time of execution, irrespective of the date of the instrument, fixes the commencement of this limited time within which record may be made. The date of the instrument may be *prima facie* evidence of the time of its execution; but it is only that. § 103; *Briggs v. Fleming*, *supra*. It is competent to show by parol that there was a mistake in the date. It may happen that one purchasing the property, and finding a mortgage recorded more than ten days after its execution, may be misled into the supposition that it is void; but he is nevertheless bound by the constructive notice imparted by the record if the mortgage was in fact recorded within that time. The purchaser must be supposed to know the law, and to know that the date of the instrument may not be the true date of its execution. He buys therefore at his peril. *Stonebreaker v. Kerr*, 40 Ind. 186; and see *Holman v. Doran*, *supra*; *Hoadley v. Hadley*, 48 Ind. 452. See § 210.

⁴ Rev. Code 1880, §§ 1923-1925.

the vendor or mortgagor retains actual possession thereof is valid against existing creditors, or subsequent purchasers without notice, unless a written instrument conveying the same is executed, acknowledged like conveyances of real estate, and filed for record with the recorder of the county where the holder of the property resides.¹ The recorder must keep an entry book or index for such instruments, having the pages thereof ruled so as to show in parallel columns the mortgagors or vendors; the mortgagees or vendees; the date of the filing of the instrument; the date of the instrument itself; its nature; the page and book where the record is to be found.

No sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession, obtained in pursuance thereof without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages.

Whenever any written instrument of the character above contemplated is filed for record as aforesaid, the recorder shall note thereon the day and hour of filing the same, and forthwith enter in his entry book all the particulars so required; and from the time of said entry the sale or mortgage shall be deemed complete as to third persons, and have the same effect as though it had been accompanied by the actual delivery of the property sold or mortgaged.

205. Kansas.²— Every mortgage, or conveyance intended to operate as a mortgage, of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor,³ and as against subsequent purchasers and mortgagees in good faith,⁴ unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated, or, if the mort-

¹ *Stewart v. Smith*, 60 Iowa, 275.

² Compiled Laws 1885, §§ 3499–3505.

³ In such case the mortgage is void as against a creditor obtaining a prior lien by execution. *Jewell v. Simpson* (Kans.), 17

Pac. Rep. 463; *Ramsey v. Glenn*, 33 Kans. 271; 6 Pac. Rep. 265.

⁴ *Tyler v. Safford*, 31 Kans. 608; *Lockwood v. Crawford*, 29 Kans. 286.

gagor be a resident of this state, then of the county of which he shall at the time be a resident. Upon the receipt of any such instrument, the register shall indorse on the back thereof the time of receiving it, and shall file the same in his office, to be kept there for the inspection of all persons interested. Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, and if said mortgage is to secure the payment of money, the amount yet due and unpaid.¹ Such affidavits shall be attached to and filed with the instrument or copy on file to which it relates. If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon, in good faith, it shall be as valid to continue in effect such mortgage as if the same had been made and filed within the period above provided.²

In the absence of stipulations to the contrary, the mortgagee of personal property has the legal title thereto, and the right of possession.

206. Kentucky.³—All deeds and mortgages and other instruments of writing which are required by law to be recorded, to be effectual against purchasers without notice, or creditors, must be recorded in the clerk's office of the court of the county in which the property conveyed, or the greater part thereof, may be. No deed of trust or mortgage, conveying a legal or equitable title to real or personal estate, shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law,

¹ See *Swiggett v. Dodson* (Kans.), 17 Pac. Rep. 594.

² A copy of any such original instrument, or any copy thereof so filed as aforesaid, including any affidavit made in pursuance of this act, certified by the register in whose office the same shall have

been filed, shall be received in evidence, but only of the fact that such instrument or copy and such affidavit was received and filed according to the indorsement of the register thereon, and of no other fact.

³ G. S. 1873, and 1871, p. 256, ch. 24, §§ 9-11.

and lodged for record. All *bonâ fide* deeds of trust or mortgage shall take effect in the order that the same shall be legally acknowledged or proved and lodged for record.

207. In Louisiana¹ a chattel mortgage, except of a ship or other vessel, is unknown to the law. Movables are not susceptible of being mortgaged. Even a mortgage of such property made in another state, and valid there, will not be enforced in this state, because the courts do not feel bound by the comity of nations to enforce a contract which, if made in this state, would not defeat rights acquired by attachment under their own laws.²

208. Maine.³—No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded by the clerk of the city, town, or plantation, organized for any purpose, in which the mortgagor resides. When all the mortgagors reside without the state, the mortgage shall be recorded in said town, city, or plantation where the property is when the mortgage is made; but if part of the mortgagors reside in the state, then in the cities, towns, or plantations in which such mortgagors reside. A mortgage made by a corporation shall be recorded in the town where it has its established place of business. If any mortgagor resides in an unorganized place, the mortgage shall be recorded in the oldest adjoining town or plantation organized as aforesaid in the county. The mortgage is considered as recorded when received.⁴

209. In Maryland⁵ no personal property of any description whatever, whereof the vendor, mortgagor, or donor shall remain in possession, shall pass, alter, or change, nor shall any such property be transferred to any purchaser, mortgagee, or donee, except by bill of sale or mortgage acknowledged and recorded; but this provision shall not be construed to extend to any sale or gift where the same is accompanied by delivery, nor to invalidate

¹ Rev. Civ. Code 1870, § 3289.

⁵ Rev. Code 1878, art. 44, §§ 45, 49, 50,

² *Delop v. Windsor*, 26 La. Ann. 185.

51, 52. For affidavit see § 36. As to effect of recording, *Cahoon v. Miers*, 67 Md.

³ R. S. 1883, ch. 91, §§ 1, 2.

573; 11 Atl. Rep. 278.

⁴ See § 270, and *Jones v. Parker*, 73 Me. 248, as to what constitutes a sufficient delivery for record.

such transfer as between the parties thereto. A mortgage of personal property shall be executed, acknowledged, and recorded as bills of sale. Bills of sale must be recorded in the county or city where the seller or donor resides, within twenty days from the date thereof.

A mortgage of personal property is deemed to contain an implied covenant, unless the contrary is therein expressed, by the mortgagor, to pay the debt and interest specified in said mortgage.

Mortgages of personal property are valid and take effect, except as between the parties thereto, only from the time of recording; and in case of more than one mortgage, the one first recorded has preference.

210. Massachusetts.¹—Mortgages of personal property shall be recorded in the records of the city or town where the mortgagor resides when the mortgage is made, and on the records of the city or town in which he then principally transacts his business, or follows his trade or calling. If the mortgagor resides out of the commonwealth, his mortgage of personal property, which is within the commonwealth when the mortgage is made, shall be recorded on the records of the city or town where the property then is.

Every mortgage of personal property shall be recorded within fifteen days from the date written in such mortgage,² and when such a mortgage is required to be recorded in two different places, and is recorded in one of such places within said fifteen days, it may be recorded in the other within ten days from the date of the first record.

Until a mortgage of personal property has been recorded as provided in the preceding section, it shall not be valid against any person other than the parties thereto, unless the mortgaged property is delivered to and retained by the mortgagee; and any record of a mortgage made subsequently to the times limited in said section shall be void and of no effect.

No record is necessary to the validity of a mortgage, or other

¹ G. S. 1860, ch. 151, §§ 1-5; P. S. 1882, ch. 192, §§ 1-4; Acts 1883, ch. 73.

² Prior to the change in the statute in 1883, parol evidence is admissible to show that the date stated in the mortgage is not

its true date, from which the fifteen days limited by the statute begins to run. *Shaughnessey v. Lewis*, 130 Mass. 355; *Orcutt v. Moore*, 134 Mass. 48. And see § 203.

instrument relating to a ship or vessel, nor to the validity of a mortgage of goods at sea or abroad, if the mortgagee takes possession of such goods as soon as may be after their arrival in this commonwealth.¹

Such mortgages are considered as recorded at the time when left for the purpose in the clerk's office.²

211. Michigan.³ — Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor,⁴ and as against subsequent purchasers or mortgagees in good faith,⁵ unless the mortgage, or a true copy thereof, is filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as city clerks, where the mortgagor resides,⁶ except when the mortgagor is a non-resident of the state, when the mortgage, or a true copy thereof, must be filed in the office of the township clerk of the township, or city clerk of the city, or city recorder of cities having no officer known as clerk, where the property is.

Every such mortgage shall cease to be valid, as against the creditors of the person making the same, or subsequent purchasers and mortgagees in good faith, after the expiration of one year from the filing of the same or a copy thereof, unless, within thirty days next preceding the expiration of the year, the mortgagee, his agent or attorney, shall make and annex to the instrument or

¹ Such a mortgage may be foreclosed without recording notice of intention to do so. Notice need only be served as required by statute. *Taber v. Hamlin*, 97 Mass. 489.

² *Jacobs v. Denison*, 141 Mass. 117.

³ Compiled Laws 1871, ch. 167, pl. 10, 13, 14, or §§ 4706, 4709, 4710; Annotated Stats. 1882, §§ 6193-6197.

Section 4703 has no application to mortgages or conveyances intended to operate as such. It applies only to absolute sales. *Cooper v. Brock*, 41 Mich. 488.

⁴ See *Putnam v. Reynolds*, 44 Mich. 113. As against creditors whose rights intervene between the making and filing

of a chattel mortgage, this is void, and not merely presumptively void. *Crippin v. Fletcher*, 56 Mich. 386; *White v. Matthews*, 56 Mich. 392; *Wallen v. Rosman*, 45 Mich. 333; *Haynes v. Leppig*, 40 Mich. 607.

⁵ The words "purchaser or mortgagee in good faith" mean a purchaser or mortgagee for valuable consideration without notice. *People's Sav. Bank v. Bates* (U. S.), 7 S. Ct. 679. A mortgage once filed cannot be taken from the records. A certified copy serves to show the filing and for use in taking possession. *Warner v. Comstock*, 55 Mich. 615.

⁶ *Reynolds v. Case*, 60 Mich. 76.

copy on file as aforesaid an affidavit, setting forth the interest which the mortgagee has, by virtue of said mortgage, in the property therein mentioned; upon which affidavit the township or city clerk shall indorse the time when the same was filed: provided, that such affidavit being made and filed before any purchase of such mortgaged property shall be made, or other mortgage received, or lien obtained thereon in good faith, shall be as valid to continue in effect such mortgage as if the same were made and filed within the period as above provided. The effect of any such affidavit shall not continue beyond one year from the time when such mortgage would otherwise cease to be valid as against subsequent purchasers or mortgagees in good faith; but within thirty days next preceding the time when any such mortgage would otherwise cease to be valid as aforesaid, a similar affidavit may be filed and annexed as provided in the preceding section, and with like effect.¹

212. Minnesota.² — Every mortgage of personal property which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless it appears that such mortgage was executed in good faith, and not for the purpose of defrauding any creditor, and unless the mortgage, or a true copy thereof, is filed as herein-after provided. Every such instrument shall be filed in the town, city, or village where the property mortgaged is at the time of the

¹ Renewal at any time on the anniversary day of the filing of the mortgage is sufficient. *Griffin v. Forrest*, 13 N. W. Rep. 603. See § 286. See, also, as to time of renewal, *Burrill v. Wilcox Lumber Co.* (Mich.) 32 N. W. Rep. 824.

A certified copy of a mortgage on file is evidence only of the fact that such instrument was received and filed. *Shelden v. Merrill* (Mich.), 37 N. W. Rep. 66.

An affidavit made by one of two mortgagees named in the mortgage is sufficient. *Manwaring v. Jenison*, 61 Mich. 117.

As to what is a sufficient statement of

the venue in the affidavit, see *Griffin v. Forrest*, *supra*.

As to computation of time for re-filing, see *Griffin v. Forrest*, 49 Mich. 309.

² G. S. 1878, ch. 39, §§ 1-5; Amended Laws 1883, ch. 38. As to filing in counties not organized, see Laws 1876, ch. 53. When the mortgage is duly filed, leaving the possession of the property with the mortgagor makes the mortgage only *prima facie* fraudulent. *Braley v. Byrnes*, 25 Minn. 297.

The copy filed must be a true copy of the original mortgage. Trifling errors in the copy will not invalidate the filing. *Gillespie v. Brown*, 16 Neb. 457.

execution of such mortgage, and a copy thereof filed in the town or city or village where the mortgagor, if a resident of the state, resides at the time of the execution thereof.¹ In each town such instrument shall be filed in the office of the town clerk thereof; and in the several cities and villages in the office of the recorder, clerk, or other officer in whose custody the records of the city or village are kept.² Every mortgage so filed shall be held and considered to be full and sufficient notice to all parties interested of the existence and conditions thereof, but shall cease to be notice as against the creditors of the mortgagor, and subsequent purchasers and mortgagees in good faith, after the expiration of two years from the filing thereof; provided that no mortgage of goods or chattels shall be notice of any fact, as against the creditors of the mortgagor, or subsequent purchasers or mortgagees in good faith, unless the same is acknowledged before some officer authorized to take acknowledgment of deeds. Township clerks are authorized to take and certify acknowledgments of chattel mortgages.

Every chattel mortgage upon property situate, at the time of the execution of such mortgage, in a county not organized into townships, and of which county the mortgagor is then a resident, shall be filed in the office of the register of deeds for such county. Such instrument shall remain on file for the inspection of all persons interested. Every mortgage filed shall be held and considered to be full and sufficient notice to all parties interested of the existence and conditions thereof, but shall cease to be notice as against the creditors of the mortgagor, and subsequent purchasers and mortgagees in good faith, after the expiration of two years from the filing thereof: provided that no mortgage of goods or chattels shall be notice of any fact, as against the creditors of the mortgagor, or subsequent purchasers or mortgagees in good faith, unless the same is acknowledged before some officer authorized to take acknowledgments of deeds.³

¹ The statute applies to a mortgage of future crops, the seed of which has not been sown at the time of the execution of the mortgage, although in a literal sense the crops are not then *in esse*, and cannot be said to be then in any place. But the statute is intended to apply to all chattel mortgages. *Miller v. McCormick Harvesting Machine Co.* 35 Minn. 399.

² If the mortgagor resides and the property mortgaged is situated in an incorporated village, the proper office in which to file the mortgage or a copy is the office of the town clerk of the town in which the village is situated, and it need not be filed in the office of the recorder or clerk of the village. *Moriarty v. Gullickson*, 22 Minn. 39.

³ A copy of any such mortgage, or copy

Every chattel mortgage shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of two years from the time the same becomes due, unless before the expiration of the two years the mortgagee, his agent or attorney, shall make and file as aforesaid an affidavit setting forth the interest which the mortgagee has, by virtue of such mortgage, in the property mentioned therein, which affidavit he shall annex to the instrument or copy on file, and shall indorse on said affidavit the time when it was filed. The effect of any such affidavit shall not continue beyond one year from the time when such mortgage would otherwise cease to be valid as against subsequent purchasers in good faith; but before the time when any such mortgage would otherwise cease to be valid as aforesaid, a similar affidavit may be filed and annexed, and with like effect.¹

213. Mississippi.² — Every deed respecting the title to personal property, which by law ought to be recorded, shall be recorded in the office of the clerk of the chancery court of the county in which such property may remain; and if, afterwards, the person claiming title under such deed shall permit any other person, in whose possession such property may be, to remove with the same, or any part thereof, out of the county in which such deed shall be recorded, and shall not, within twelve months after such removal, cause the deed to be duly certified to the chancery court of that county into which property may be removed, and to be delivered to the clerk of the chancery court, to be recorded, such deed, for so long as it remains without being recorded or delivered for record in such last mentioned county, and for so much of the property as may have been removed, shall be void, as to all pur-

filed and indorsed as aforesaid, together with any statement properly made therewith, when certified by the clerk or other proper officer to be a true copy of the original on file in his office, shall be received in evidence in like manner and with like effect as the original mortgage, or copy filed with indorsement. G. S. ch. 39, § 7; *Ellingboe v. Brakken*, 36 Minn. 156.

¹ Laws 1879, §§ 3, 4; Laws 1887, ch. 58.

Provision is also made for filing con-

tracts which preserve in the vendor the title to property sold conditionally. G. S. 1878, ch. 39, §§ 15, 16; Laws 1883, ch. 38, § 2. Such contracts, though not filed as prescribed, are not void as to creditors having actual notice of the state of the title at the time of making levy. (*Dyer v. Thorstad*, 35 Minn. 534. And see *Tucker v. Tilton*, 55 N. H. 223.

² R. Code 1871, §§ 2298, 2305; R. Code 1880, §§ 1210, 1216, 1359.

chasers for a valuable consideration without notice, and as to all creditors.

Mortgages, deeds of trust, and other liens on personal property, executed out of this state, shall only be binding on such property, when removed into this state, as against creditors and *bonâ fide* purchasers without notice, from the time such mortgage or deed of trust, duly acknowledged or proved, shall be delivered to the proper clerk in this state for record.

It shall be lawful for persons to make and execute mortgages or deeds of trust upon growing crops, or upon crops to be grown within fifteen months from the making of such mortgage or deed of trust, which incumbrance shall be valid and binding upon the interest of such mortgagor or grantee in such crop, but shall not be prior to other liens provided for landlords and employers.

214. Missouri.¹—No mortgage or deed of trust of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee, or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved, and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of lands are, by law, directed to be acknowledged or proved and recorded.²

These provisions shall not void or defeat a contract of bottomry, respondentia, nor any transfer, or assignment, or hypothecation of any boat, vessel, ship, or goods at sea or abroad, if the mortgagee, trustee, or *cestui que trust* shall take possession of such boat, vessel, ship, or goods as soon as may be after the arrival thereof within this state.

215. Montana Territory.³—No mortgage of goods, chattels, or personal property shall be valid as against the rights and interests of any other person than the parties thereto, unless the possession of such goods, chattels, or personal property be delivered to and retained by the mortgagee, or the mortgage provide that

¹ Wagner's Statutes 1872, ch. 35, p. 281, §§ 8, 9; R. S. 1879, §§ 2503, 2504.

² See *White v. Graves*, 68 Mo. 218; *Heryford v. Davis*, 102 U. S. 235.

³ Comp. Stats. 1887, §§ 1538-1544. These provisions apply to mortgages and

deeds of trust made by incorporated companies. The affidavit may be made on behalf of the company by the president, secretary, or managing agent thereof. Comp. Stats. 1887, § 1555.

the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent, an affidavit of those present, and of the agent or attorney of any absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor, and be acknowledged and filed as hereinafter provided.¹

Every mortgage of goods, chattels, or personal property shall be acknowledged by the mortgagor or person executing the same, in the manner provided for the acknowledgment of conveyances of real property, before some officer authorized by law to take acknowledgments of deeds.

Every mortgage of goods, chattels, or personal property, together with the affidavit of the parties thereto, or a true copy thereof, certified to be correct by the recorder or person before whom the acknowledgment has been taken, shall be filed in the office of the recorder of deeds of the county where the mortgagor resides, or, in case he is not a resident of this territory, then in the office of the recorder of deeds of the county where the goods, chattels, or personal property may be at the time of the execution of the mortgage; and such recorder of deeds shall, on receipt of such mortgage or copy, indorse thereon the time of receiving the same, and file and keep the same in his office for the inspection of all persons.

Every mortgage of goods, chattels, or personal property, made, acknowledged, and filed as provided, shall thereupon, if made in good faith, be good and valid as against the creditors of the mortgagor, and subsequent purchasers and mortgagees, from the time it is so filed until the maturity of the entire debt or obligation secured thereby, and for a period of twenty days thereafter: provided, that the entire period of time such mortgage shall be valid and binding against the creditors of the mortgagor and subsequent purchasers and mortgagees shall not exceed one year and sixty days, except by a compliance with the provisions of sections following.

Every mortgage of goods, chattels, or personal property, made, acknowledged, and filed as provided by the laws of this territory,

¹ As to affidavit, see *Butte Hardware Power, Ib. 589; Baker v. Gans, Ib. 590; Co. v. Sullivan (Mont.), 16 Pac. Rep. 588; Binkley v. Forkner (Ind.), 15 N. E. Rep. Leopold v. Silverman, Ib. 580; Baker v. 343.*

may be renewed at or before the maturity of the debt or obligation secured thereby, in case such debt or obligation or any part thereof be unpaid or unfulfilled, by filing an affidavit showing the date of such mortgage, the name of the mortgagor and mortgagee, the date of filing the same, the amount of the debt or obligation secured thereby, and the amount of the debt justly owing at the time of filing such affidavit, or the conditions of the obligation unfulfilled, the time to which the same is extended, which time shall not exceed one year, and that such debt or obligation was neither made nor renewed or extended to hinder, delay, or defraud the creditors or subsequent mortgagees of the mortgagor; which affidavit shall be subscribed and sworn to by the mortgagee before an officer authorized to administer oaths, and filed in the office where such mortgage therein described is filed; and thereupon the clerk and recorder of deeds of such county shall attach such affidavit to the mortgage therein described, and note the date of filing thereof opposite the entry of the mortgage therein described in the book provided by law for the entry of chattel mortgages; and thereby such mortgage shall be renewed, continue, and be valid and of full force and effect upon the goods, chattels, or personal property described therein for the time stated in such affidavit, not to exceed one year.

The filing of the affidavit does not extend the time of maturity of any debt or the execution of any obligation secured by such mortgage, but the same may be enforced according to the conditions thereof, and such mortgage foreclosed according to law at any time within the period to which such mortgage is so renewed, unless agreement be made between the mortgagee and mortgagor extending the time of payment of such debt or fulfillment of such obligation to the time stated in such affidavit.

Any subsequent mortgagee of goods, chattels, or personal property, upon which a prior mortgage exists, which has been extended or renewed as provided, may, at any time during the existence of such mortgage, pay the amount of the debt and interest owing and secured thereby as shown by such affidavit and mortgage, or deposit the full amount thereof with the county clerk and recorder of deeds of the county wherein such affidavit and mortgage are filed, subject to the order of the mortgagee, his legal representatives or assigns; and the receipt or duplicate receipt for such payment or deposit shall be filed in said office and attached to such

mortgage, and thereby such subsequent mortgagee shall be subrogated to all the rights of the prior mortgagee under such mortgage.

These provisions shall extend to all such bills of sale, deeds of trust, and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or lien upon such property.¹

216. Nebraska.²—Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides;³ or, in case he is a non-resident of the state, then in the office of the clerk of the county where the property mortgaged may be at the time of executing such mortgage; and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such

¹ A copy of any mortgage of goods, chattels, or personal property, made, acknowledged, and filed as provided in this act, certified by the recorder in whose office the same shall be filed, may be read in evidence in any court in this territory, without further proof of the execution of the original, if said original be lost or out of the power of the person wishing to use it.

² Comp. Stats. 1885, ch. 32, §§ 14-16; Laws 1877, p. 51, as amended by Laws 1879, p. 107. Prior to these statutes mortgages were recorded, and it was requisite that they should be duly acknowledged or proved, in the same manner as is prescribed for acknowledging or proving mortgages of real property, before a valid record could be made. *Hooker v. Hammill*, 7 Neb. 231; *Becker v. Anderson*, 11 Neb. 493; *S. C.* 9 N. W. Rep. 640; construing the several sections of ch. 43 of R. S. of 1866; ch. 61 of G. S. of 1873.

Under this statute a mortgage, though duly recorded, is *prima facie* void unless possession of the property be also delivered to the mortgagee. If no evidence of the good faith of the transaction be given, the presumption of fraud becomes conclusive as to creditors and *bona fide* purchasers. *Pyle v. Warren*, 2 Neb. 241; *Brunswick v. McClay*, 7 Neb. 137; *Turner v. Killian*, 12 Neb. 580; *Ransom v. Schmela* (1882), 15 Rep. 19. But a creditor cannot raise the question of fraud until he has obtained judgment, and a purchaser cannot raise it until he has established his good faith. *Ransom v. Schmela*, *supra*; and see §§ 245 and 345.

³ A mortgage duly filed in the county where the mortgagor resides is constructive notice there, and constructive notice into whatever county the mortgagor may remove with the property. *Cool v. Roche* (Neb.), 31 N. W. Rep. 367. See § 260.

mortgage or instrument may be so filed although not acknowledged, and shall be as valid as if the same were fully spread at large upon the records of the county.

Every such mortgage shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of five years from the filing of the same or copy thereof.

No sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee in actual possession, obtained in pursuance of such sale, contract, or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which such vendee or lessee resides; said copy shall have attached thereto an affidavit of such vendor or lessor, or his agent or attorney, which shall set forth the names of the vendor and vendee, or lessor and lessee, or description of the property transferred, and the full and true interest of the vendor or lessor therein. All such sales and transfers shall not remain valid against purchasers in good faith, or judgment, or attaching creditors without notice, for a longer period than one year, unless such vendor or lessor shall, within thirty days prior to the expiration of one year from the date of such sale or transfer, file a copy thereof, verified as aforesaid, in the office of said clerk, and the said vendor or lessor may preserve the validity of his said sale or transfer of personal property by an annual refiling in the manner as aforesaid of such copy.¹

217. Nevada.²—No mortgage of personal property shall be valid for any purpose against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage shall be recorded in the office of the county recorder of the county where the property is situated, and also in the county where the mortgagor resides. A mortgage upon personal property, including growing crops, executed, acknowledged and recorded, shall be valid against all third parties without such delivery of possession: provided, that no such mortgage shall be valid for any purpose as against other than the parties thereto, unless there be appended

¹ Laws 1877, p. 170, § 1.

² Statutes 1887, ch. 57.

or annexed thereto the affidavits of the mortgagor and mortgagee, or some person in their behalf, setting forth that the mortgage is made in good faith, and given for a debt actually owing from the mortgagor, stating the amount and character of such debt, and the same is not made to hinder, delay, or defraud any creditor of the mortgagor.

218. New Hampshire.¹— Possession of the mortgaged property must be delivered to and retained by the mortgagee, or the mortgage must be recorded in the office of the clerk of the town in which the mortgagor resides at the time of making the same.

Mortgages of personal property may be recorded in unincorporated places which may be required to pay any public tax; and the clerks thereof are required to record the same. When no such clerk is chosen, such mortgage may be recorded by the clerk of the town or place adjoining said unincorporated place paying the greatest proportion of the state tax, and such clerk shall record the same.

When the mortgagor of personal property resides out of the state at the time of making the mortgage, it shall be recorded in the town where the property is situate.²

No such mortgage shall be valid against any person except the mortgagor, his executors and administrators, unless possession is delivered, or the mortgage is sworn to and recorded in the manner prescribed. These provisions do not affect any transfer of property under bottomry or respondentia bonds, or of any ships or goods at sea or abroad, if the mortgagee take possession thereof as soon as may be after their arrival in the state.

219. New Jersey.³— Every mortgage, or conveyance intended

¹ G. S. 1878, ch. 137, §§ 2-5, 12, 16. The first statute requiring the registration of mortgages of personal property was passed in June, 1832. For affidavit, see § 37.

² Property is situate where it is used day after day, or where it is stored when not in actual use. *Lathe v. Schoff*, 60 N. H. 34.

³ Supp. to Rev. 1886, p. 491, §§ 8-19, being act of 1885. This act does not apply to any mortgage of personal property

included in a mortgage of franchises and real estate made or that may be made by any railroad company, which has been or shall be recorded as a mortgage of real estate in every county in which such railroad or any part of it is or shall be located. It is not necessary to record any such mortgage as a chattel mortgage. *Ib.* § 11.

Before the enactment of this statute of 1885, it seems to have been uncertain whether, under the act of 1881, an affi-

to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery and followed by an actual continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, having annexed thereto an affidavit or affirmation made and subscribed by the holder or holders of said mortgage, his, her, or their agent or attorney, stating the consideration of said mortgage, and as nearly as possible the amount due and to grow due thereon, be recorded in the clerk's office of the county wherein the mortgagor, if a resident of this state, shall reside at the time of the execution thereof, and if not a resident of this state, then in the clerk's office of the county where the property so mortgaged shall be at the time of the execution of such instrument: provided, that in any county where the office of register of deeds exists, or hereafter may be created, such instruments shall be recorded in the office of such register. No chattel mortgage, or conveyance intended to operate as a mortgage, of goods and chattels shall be recorded unless the execution thereof shall be first acknowledged or proved, and such acknowledgment or proof certified thereon in the manner prescribed by the act respecting conveyances.

Such chattel mortgages shall be properly indexed, and the records and certified copies thereof shall be evidence in the same manner and in like cases as the record of deeds.

Every chattel mortgage so recorded shall be valid against the creditors of the mortgagor, and against subsequent purchasers and mortgagees, from the time of the recording thereof until the same be cancelled of record in the manner now provided by law for cancelling of mortgages of real estate.¹

davit as to consideration was essential to the validity of a chattel mortgage. See Article by John R. Hardin, 7 N. J. Laws, J. 295. Previous to this statute mortgages of chattels were filed, and refiled at the end of one year.

¹ A copy of any such original instrument, or of any copy thereof, so filed as aforesaid, including any statement made in pursuance of this act, certified by the clerk or register in whose office the same

shall be filed, shall be received in evidence; but only of the fact that such instrument or copy and statement was received and filed according to the indorsement of the clerk or register thereon, and of no other fact; and in all cases the original indorsement by the clerk or register, made in pursuance of this act upon such instrument or copy, shall be received in evidence of the facts stated in such indorsement. R. S. 1879, p. 709, § 42.

220. New Mexico.¹—Every mortgage, or conveyance intended to operate as a mortgage, of personal property, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited in the office of the county recorder of the county where the property shall then be situated.

Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit, exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage; and if such mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached to and filed with the instrument, or copy on file to which it relates. If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon in good faith, it shall be as valid to continue in effect such mortgage as if the same had been made and filed within the period above provided.

In the absence of stipulation to the contrary, the mortgagor shall have the right of possession.

221. New York.²—Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors

¹ Comp. Laws 1884, §§ 1587-1593.

A copy of such original instrument, or any copy thereof, so filed as aforesaid, including any affidavit made in pursuance of this act, certified by the recorder in whose office the same shall be filed, shall be received in evidence; but only of the fact that such instrument or copy and

such affidavit was received and filed according to the indorsement of the recorder thereon, and of no other fact.

² R. S. 1875, pp. 143-145, §§ 9-14. This is the original act of April 29, 1833, as amended by Laws of 1873, ch. 501; R. S. 1882 (7th ed.), pp. 2249, 2250.

of the mortgagor,¹ and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof,² shall be filed in the several towns and cities of this state where the mortgagor therein, if a resident of this state, shall reside at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument. In the city of New York such instruments shall be filed in the office of the register of said city; in the several cities of this state, other than the city of New York, and in the several towns in this state in which a county clerk's office is kept, in such office; and in each of the towns in this state, in the office of the town clerk thereof;³ and such register and clerks are required to file all such instruments aforesaid presented to them respectively for that purpose, and to indorse thereon the time of receiving the same, and to deposit the same in their respective offices, to be kept there for the inspection of all persons interested.

Every mortgage so filed shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of each and every term of one year after the filing of such mortgage, a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed in the office of the clerk or register aforesaid of the town or city where the mortgagor shall then reside, if the mortgagor shall then be a resident of this state; and if not such resident, then in the office of the clerk or register of the town or city where the property so mortgaged was at the time of the execution of such mortgage.⁴

¹ By "creditors" is meant not only judgment creditors, but simple contract creditors; *Clark v. Gilbert*, 10 Daly, 316; though he is not in a position to attach the mortgage until he has obtained judgment. *Thompson v. Van Vechten*, 27 N. Y. 568.

² As to what is sufficient accuracy in the copy, see *Mack v. Phelan*, 92 N. Y. 20.

³ *Martin v. Rothschild*, 42 Hun, 410.

⁴ As amended, Laws 1879, ch. 418.

A copy of any such original instrument, or of any copy thereof, so filed as aforesaid, including any statement made in pursuance of this act, certified by the clerk or register in whose office the same shall be filed, shall be received in evidence, but only of the fact that such instrument or copy and statement was received and filed according to the indorsement of the clerk or register thereon, and of no other fact; and in all cases the original indorsement

Any person having any lien or incumbrance on any canal-boat, steam-tug, scow, or other craft navigating the canals of the state, by a chattel mortgage, shall file the same, or a true copy thereof, in the office of the auditor of the canal department.¹ Every such mortgage which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the property mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be so filed. Every mortgage so filed shall cease to be valid as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the said term of one year a true copy of such mortgage, together with a statement exhibiting the interest of the mortgagee in the property thereby claimed by him by virtue thereof, shall be again filed.

222. North Carolina.²—No deed of trust or mortgage of per-

by the clerk or register made in pursuance of this act, upon such instrument or copy, shall be received in evidence of the facts stated in such indorsement.

Under this provision a certified copy is no proof of the execution of the mortgage. *Sunderlin v. Wyman*, 10 Hun, 493; *Fellows v. Van Hyring*, 23 How. Pr. 231; *Maxwell v. Inman*, 42 Hun, 265.

¹ 3 R. S. 1875, p. 789, §§ 36-38; p. 660, §§ 44; R. S. 1882, 7th ed. p. 2251, being act of April 28, 1864. The provisions of the act of 1833, so far as they applied to canal-boats, were superseded by those of the act of 1864, and the filing of such mortgages depends wholly upon the latter act. This act has never been amended, as has the act of 1833, so as to require a copy of the mortgage, with a statement of interest, to be again filed within thirty days next preceding the expiration of each and every term of one year after the filing of the mortgage. Therefore a mortgage of a canal-boat need not be refiled after the re-filing within thirty days before the expiration of the year from the original filing.

No subsequent re-filing after the first is necessary to keep the mortgage a continuing security. *In re Canal-boat Independence*, 9 Ben. 395. See § 286.

Under this statute a re-filing is not effectual unless a statement exhibiting the interest of the mortgagee be filed with the mortgage or the copy of it. *Marsden v. Cornell*, 62 N. Y. 215.

Want of immediate delivery and change of possession raises not merely a presumption of fraud, which may be rebutted, but makes the alleged lien absolutely void. *Keller v. Paine* (N. Y.), 13 N. E. Rep. 635.

² *Battle's Revisal*, 1873, ch. 35, §§ 12, 13.

When a mortgagee fails to register his mortgage until after an attachment of the property has been made by a creditor of the mortgagor, and the sheriff has proceeded to sell the property without any order in the cause, the mortgagee cannot recover in trover, although the sale is illegal and unauthorized, because he is entitled to possession only from the time of registration of his mortgage. *Murchison v. White*, 8 Ired. 52.

sonal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage in the county where the donor, bargainor, or mortgagor resides;¹ or in case the donor, bargainor, or mortgagor shall reside out of the state, then in the county where the said personal property, or some part of the same, is situate; or in case of choses in action, where the donee, bargainee, or mortgagee resides.

223. Ohio.²—A mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited with the clerk of the township in which the property so mortgaged is situated at the time of the execution of the instrument; but when the mortgagor is a resident of a township where the office of county recorder is kept, or when the mortgagor is a resident of a township entirely merged in a city or incorporated village in which the office of county recorder is kept, or when he is a non-resident of the state, and the property is within such township, the mortgage shall be filed with the county recorder.

Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless, within thirty days next preceding the expiration of the said term of one year, a true copy of such mortgage, together with a statement, verified as provided in the last section, together with a statement exhibiting the interest of the mortgagee in the property at the time last aforesaid, claimed by virtue of such mortgage, is again filed in the office where the original was filed.³

¹ *Weaver v. Chunn* (N. C.), 6 S. E. Rep. 370.

² 1 R. S. 1880, §§ 4150–4153, 4155; Amended Laws 1886, p. 72. A certified copy of the mortgage is made evidence. Supp. of R. S. 1884, § 4156; Laws 1886, p. 206.

³ The year within which a refiling may be made begins to run from the exact time of the preceding filing, and is computed at the corresponding day and hour of the following year. *Seaman v. Eager*, 16 Ohio St. 209.

224. Oregon.¹— Every assignment of personal property by way of mortgage or security, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, creates a presumption of fraud as against the creditors of the assignor during his possession, or as against subsequent purchasers in good faith and for a valuable consideration, disputable only by making it appear on the part of the person claiming under such assignment that the same was made in good faith for a sufficient consideration, and without intent to defraud such creditors or purchasers; but such presumption does not exist in the case of a mortgage duly filed or recorded as provided by law.

It shall be the duty of the county clerk, upon the presentation for that purpose of any mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, or a copy of any such instrument, and the payment of his fees, to indorse thereon the time of receiving the same, and to deposit such instrument or copy in his office, to be kept for the inspection of all persons interested.

Every such mortgage shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgages in good faith, after the expiration of one year from the filing of the same, or a copy thereof, unless, within thirty days next preceding the expiration of the one year, the mortgagee, his agent or attorney, shall make and annex to the instrument, or copy on file as aforesaid, an affidavit setting forth the interest which the mortgagee has, by virtue of such mortgage, in the property therein mentioned, upon which affidavit the clerk shall indorse the time when the same was filed. The effect of any such affidavit shall not continue beyond one year from the time when such mortgage would otherwise cease to be valid as against the creditors of the person making such mortgage, or subsequent purchasers or mortgagees in good faith; but within thirty days next preceding the time when any such mortgage would otherwise cease

The provision, that where there is no change of possession the mortgage shall be absolutely void unless *forthwith* deposited with the proper recording officer, does not avoid the mortgage *in toto*, but it becomes effective whenever deposited from

that time. *Gibson v. Warden*, 14 Wall. 244; *Wilson v. Leslie*, 20 Ohio, 161.

¹ Gen. Laws 1872, pp. 262, 527, 756.

In case of successive chattel mortgages upon the same property, the one first filed is entitled to priority. *Pittock v. Jordan* (Oreg.), 13 Pac. Rep. 510.

to be valid as aforesaid, a similar affidavit may be filed and annexed as before provided, and with like effect.¹

225. Pennsylvania.² — Mortgages in writing upon certain specified property,³ for any sum not less than five hundred dollars, are valid when properly acknowledged and recorded in the county where the chattels actually are at the time of the execution of such mortgage; but they are good for only one year unless renewed.

No mortgage shall be valid for a longer period than three months after the maturity thereof, unless a statement in writing signed by the mortgagee, or his agent duly constituted, and acknowledged and specifying the amount due upon said mortgage, shall be recorded in the office of the recorder of deeds of the county wherein such mortgage is recorded, within the said period of three months; and in case such statement be filed, the said mortgages shall continue valid for the amount due for a further period of one year from the maturity thereof.

226. Rhode Island.⁴ — No mortgage of personal property shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee; or unless the said mortgage be recorded in the office of the clerk of the town where the mortgagor shall reside, if in this state, and if not, where the property is at the time of making the same; but this requirement shall not affect any transfer of property under bottomry or respondentia bonds, or of any ships or goods at sea or abroad, if the mortgagee shall take possession thereof as soon as may be after the arrival of the same in this state.

Every town clerk shall record mortgages of personal property in a book to be by him kept for that purpose, with the time when the same are received and recorded.

¹ A copy of any such instrument, or of any copy thereof so filed as aforesaid, including any affidavits annexed thereto in pursuance of this statute, certified by the clerk in whose office the same shall be filed, shall be received in evidence, but only of the fact that such instrument, copy, or affidavit was received and filed according to the indorsement of the county clerk

thereon, and of no other fact. Gen. Laws 1872, p. 522, § 50. The affidavit of continuance is unavailing if filed prior to the thirty days. *Case Threshing Machine Co. v. Campbell* (Oreg.), 13 Pac. Rep. 324.

² Laws 1887, p. 73, No. 32.

³ See § 121.

⁴ G. S. 1872, ch. 155, §§ 9, 10; P. S. 1882, ch. 176, §§ 9, 10.

A mortgage of both real and personal property may be recorded with the record of mortgages of real estate only ; in such cases, the town clerk is required to enter upon the index of personal property records the books and pages upon which such mortgages are recorded.¹

227. South Carolina.² — No mortgage, or other instrument of writing in the nature of a mortgage,³ of personal property shall be valid so as to affect from the time of such delivery or execution the rights of subsequent creditors or purchasers for valuable consideration without notice, unless recorded, within forty days from the time of such delivery or execution, in the office of register of mesne conveyance of the county where the owner of said property resides, if he reside within the state ; or, if he resides without the state, of the county where such personal property is situated at the time of the delivery or execution of said deeds or instruments ; but the above mentioned deeds or instruments in writing, if recorded subsequent to the expiration of said period of forty days,⁴ shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record.⁵

¹ Laws 1878, ch. 707, § 1 ; P. S. 1882, ch. 176, § 10.

² G. S. 1882, § 2346. For some account of the earlier acts see *McKnight v. Gordon*, 13 Rich. Eq. 222. By act of February 9, 1882, it is provided that chattel mortgages and mortgages of real estate shall be recorded in different books. Acts 1881-82, p. 1053. It shall be a sufficient record of any chattel mortgages, where the amount secured is not more than one hundred dollars, to enter upon an index book, to be kept for that purpose by the register, the names of mortgagor and mortgagee, the amount and character of the debt secured, a brief description of chattels pledged, the date of said mortgage and of the maturity of said debt, and the date of presentation of such mortgage for record. Acts 1881-82, No. 685, § 3 ; G. S. 1882, § 769.

³ A note for purchase money of a chattel, wherein the vendor reserves title to the property till the price is paid, is such an

instrument. *Herring v. Cannon*, 21 S. C. 212.

⁴ A mortgage though not recorded has priority of a junior mortgage subsequently recorded, provided an action for the recovery of the property is brought by the prior mortgagee within the time allowed by law for recording his mortgage. *Talmadge v. Oliver*, 14 S. C. 522.

⁵ In all bills of sale of any plate, gold, and silver, or goods and chattels whatsoever, by way of mortgage, with right of redemption upon performance of the proviso in the said bill of sale, where the plate, gold and silver, or goods and chattels, are actually delivered unto the person to whom such bill of sale is made, and are in his actual possession (and not a delivery or seizin in form of law only), and shall continue in the same for the space of two years after the breach of the proviso in the said bill of sale, without redemption thereof, the said goods or chattels so sold and delivered and possessed as aforesaid,

Chattel mortgages must be recorded in different books from those in which mortgages of real property are recorded.¹

The mortgage of goods or chattels which shall be first recorded shall be taken, deemed, adjudged, allowed, and held to be the first mortgage.²

228. Tennessee.³ — All mortgages and deeds of trust of personal property must be in writing, and proved and registered, to be valid against the creditors of the bargainor or purchasers under him for value without notice. All deeds, bills of sale, agreements, and other instruments for the conveyance or mortgage of personal property, shall be registered in the county where the vendor or person executing the same resides, and, in case of his non-residence, where the property is.⁴

To authenticate an instrument for registration, its execution shall be acknowledged by the maker, or proved by two subscribing witnesses. All of said instruments shall have effect between the parties to the same and their heirs and representatives without registration; but as to other persons, not having actual notice of them, only from the noting thereof for registration on the books of the register, unless otherwise expressly provided. All of said instruments so registered shall be notice to all the world from the time they are noted by the register for registration as prescribed, and shall take effect from said time. Any of said instruments first registered or noted for registration shall have preference over one of earlier date, but noted for registration afterwards, unless it is proved in a court of equity, according to the rules of said court, that the party claiming under the subsequent

though with right or equity of redemption, are hereby declared to be vested in the said person or persons to whom such bill of sale was made, and their executors, administrators, and assigns, to have and to hold to them, their executors, administrators, and assigns, as their own proper goods and chattels forever; excepting such person or persons having such right or equity of redemption beyond the seas, or otherwise out of the limits of this state, all which persons shall have saved to them their equity of redemption, so as they prosecute the same within three years

after the breach of the proviso of the bill of sale, and at no time thereafter. G. S. 1882, § 2347.

¹ G. S. 1882, § 767.

² R. S. 1873, p. 549, § 2. A former provision, that a person who should mortgage any chattels a second time, while a former mortgage remained in force, should have no power to redeem in equity or otherwise, was repealed by Act No. 24, 1879.

³ Code 1884, §§ 2809, 2844, 2887-2890.

⁴ This does not apply to mortgages of choses in action. 1b. § 2004. *Duke v. Hall*, 9 Bax. 282.

instrument had full notice of the previous instrument. Any of said instruments not so proved or acknowledged, and registered or noted for registration, shall be null and void as to existing or subsequent creditors or *bonâ fide* purchasers from the makers without notice.

229. Texas.¹—Every chattel mortgage, deed of trust, or other instrument of writing intended to operate as a mortgage of or lien upon personal property, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors² of the mortgagor or person making the same, and as against subsequent purchasers and mortgagees or lien-holders in good faith, unless such instrument, or a true copy thereof, shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated; or if the mortgagor or person making the same be a resident of this state, then of the county of which he shall at the time be a resident. Upon the receipt of any such instrument the clerk shall indorse on the back thereof the time of receiving it,³ and shall file the same in his office, to be kept there for the inspection of all persons interested: provided, that if a copy be presented to the clerk for filing instead of the original instrument, he shall carefully compare such copy with the original, and the same shall not be so filed unless it is a true copy thereof; and a copy can be filed only when the original has been acknowledged.⁴

Chattel mortgages, and other instruments intended to operate as mortgages of or liens upon personal property, shall not be

¹ R. S. 1879, Appendix, p. 15, §§ 1, 2, 3, 7.

² By the word "creditors" is meant creditors who have acquired some right by attachment, execution, or otherwise. *Overstreet v. Manning* (Tex.), 4 S. W. Rep. 248, 251; *Grace v. Wade*, 45 Tex. 522, 527.

The statute contemplates the recording of instruments which are in themselves valid, but does not make valid transactions which the law prohibits. *Duncan v. Taylor*, 63 Tex. 645.

³ What indorsement sufficient: *Cook v. Halsell*, 65 Tex. 1; *Brothers v. Mundell*, 60 Tex. 240.

⁴ A copy of any such original instrument, or of any copy thereof so filed as aforesaid, certified to by the clerk in whose office the same shall have been filed, shall be received in evidence of the fact that such instrument or copy was received and filed according to the indorsement of the clerk thereon, but of no other fact.

recorded at length; but when deposited and filed, in accordance with the provisions of this act, shall have the force and effect heretofore given to a full registration thereof; and all persons shall be thereby charged with notice thereof, and of the rights of the mortgagee, his assignee, or representative thereunder; but this provision shall not be so construed as to in any manner affect the rights of any person under any instrument heretofore recorded as required by law.

All reservations of the title to, or property in chattels as security for the purchase money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and *bona fide* purchasers, unless such reservations be in writing and registered as required of chattel mortgages.¹

229 a. Utah Territory.²— No mortgage of personal property shall be valid as against the rights and interests of any person (other than the parties thereto) unless the possession of such personal property be delivered to and retained by the mortgagee, or unless the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of the parties thereto, or, in case any party is absent, an affidavit of the parties present, and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor.

Every mortgage of personal property shall be witnessed and acknowledged by the mortgagor, or person executing the same.

Every mortgage of personal property, together with the affidavit and acknowledgment thereto, shall, to constitute notice to third parties, be filed for record in the office of the recorder of the county where the mortgagor resides, or, in case he is a non-resident of this territory, then in the respective offices of the recorders of each and every county where the personal property may be at the time of the execution of the mortgage; and each of such recorders shall, on receipt of such mortgage, indorse thereon the time of filing the same with him, and shall promptly record the same, together with said affidavit and acknowledgment, in a

¹ G. L. 1885, ch. 78.

² Laws 1884, ch. 21; Laws 1886, ch. 40.

book to be kept in his office, properly indexed and specially provided for the record of chattel mortgages, and when so recorded deliver the same to the mortgagee.

Any mortgage of personal property acknowledged and filed as hereinbefore provided, shall thereupon, if made in good faith, be good and valid as against the creditors of the mortgagor, and subsequent purchasers and mortgagees, from the time it is so filed for record until the maturity of the entire debt or obligation for the security of which the same was given, and for a period of ninety days thereafter, provided the entire time shall not exceed one year.¹

The provisions of the foregoing sections extend to and include all such bills of sale, deeds of trust, and other conveyances of personal property as shall have the effect of a mortgage or lien upon such property; but do not apply to contracts for the use and conditional purchase of rolling-stock and equipment for the operation of any railway in this territory, but such contracts are valid without record.

230. Vermont.²— Possession of the mortgaged property must be delivered to and retained by the mortgagee, or the mortgage must be recorded in the office of the clerk of the town in which the mortgagor resides at the time of his making the same; or if he resides out of this state, in the town in which the property is situated; and no property, upon which such security is made, shall be removed from this state, except by consent of the mortgagee. Every town clerk shall keep a book of records for mortgages of personal property; he shall record therein any mortgage, transfer, or discharge, and give a certified copy thereof when requested, on payment of his fees therefor; shall certify the time when the same is received and recorded, and keep an alphabetical index of mortgagors and mortgagees, which record and index shall be open to public inspection.

¹ The mortgage is invalid if the property remains in the mortgagor's possession after the year, or after ninety days from the maturity of the obligation, without any measures taken to foreclose it; but where foreclosure proceedings are instituted before the expiration of the ninety

days, purchasers at an execution sale made after the expiration of the ninety days' limit, but pending the foreclosure, take subject to the mortgage. *Armstrong v. Broom* (Utah), 13 Pac. Rep. 364.

² Code 1887, §§ 2465-2468.

231. Virginia.¹— Every deed of trust or mortgage, conveying goods and chattels, shall be void as to subsequent purchasers for valuable consideration without notice, and creditors until and except from the time that it is duly admitted to record in the county or corporation wherein the property embraced in such contract or deed may be. Notwithstanding any such writing shall be duly admitted to record in one county or corporation wherein there are goods or chattels, it shall nevertheless be void as to such creditors and purchasers in respect to other goods or chattels without the same, until it is duly admitted to record in the county or corporation wherein such other goods or chattels may be.

If any goods or chattels mentioned in such writing be removed from a county or corporation into which it is admitted to record, the said writing shall, within one year after such removal, be admitted to record in the county or corporation to which the property is so removed; otherwise the same, for so long as it is not admitted to record in such last mentioned county or corporation, shall, as to the property so removed, be void as to such creditors or purchasers. But such writing shall not be so void in respect to the interests of any married woman (such interest not being her separate estate), infant, or any insane person, if, before the end of one year after the disability shall cease, the writing be recorded in the county or corporation to which the property is removed.

232. Washington Territory.²— Mortgages may be made upon all kinds of personal property, and upon the rolling-stock of a railroad company, and upon all kinds of machinery, and upon boats and vessels, and on growing crops, and on portable mills and such like property.

A mortgage of personal property is void as against creditors of the mortgagor, or subsequent purchasers and incumbrancers of the property for value and in good faith, unless it is accompanied by the affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, and it is acknowledged and recorded in the same manner as is required by law in conveyances of real property. A mortgage of personal property must be recorded in the office of the county auditor of the county in which the mortgaged property is situated, in a book kept exclusively for that purpose.

¹ Code 1873, ch. 114, §§ 5, 6, 8.

² Code 1881, §§ 1986–1988.

When personal property mortgaged is thereafter removed from the county in which it is situated, it is, as except between the parties to the mortgage, exempted from the operation thereof, unless either: 1. The mortgagee within thirty days after such removal causes the mortgage to be recorded in the county to which the property has been removed; or, 2. The mortgage be recorded in the custom-house; or, 3. The mortgagee within thirty days after such removal takes possession of the property. A mortgage on any vessel or boat, or part of a vessel, or boat, over twenty tons burden, shall be recorded in the office of the collector of customs where such vessel is registered, enrolled, or licensed, and need not be recorded elsewhere.

233. West Virginia.¹— Every deed of trust or mortgage conveying goods or chattels shall be void as to creditors and subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract or deed may be. Notwithstanding any such writing shall be duly admitted to record in one county wherein there are goods or chattels, it shall nevertheless be void as to such creditors and purchasers in respect to other goods or chattels without the same, until it is duly admitted to record in the county wherein such other goods or chattels may be. If any goods or chattels mentioned in such writing be removed from a county in which it is admitted to record, the said writing shall, within three months after such removal, be admitted to record in the county to which the property is so removed; otherwise the same, for so long as it is not admitted to record in such last mentioned county, shall, as to the property so removed, be void as to such creditors or purchasers. But such writing shall not be so void in respect to the interests of any married woman, infant, or insane person, if, before the end of three months after the disability shall cease, the writing be recorded in the county to which the property is removed. Where two or more writings, embracing the same property, are admitted to record in the same county on the same day, if the previous section does not provide for the case, that which was first admitted to record shall have priority in respect to the property in such county.

¹ Code 1870, and Code 1887, ch. 74, §§ 5-8.

234. Wisconsin.¹—No mortgage of personal property shall be valid against any other person than the parties thereto, unless the possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage or a copy thereof be filed as provided, except when otherwise directed. Every mortgage of personal property, or a copy thereof, may be filed in the office of the clerk of the town, city, or village where the mortgagor resides, or, in case he is a non-resident of the state, then in the office of the clerk of the town, city, or village where the property mortgaged may be at the time of the execution of such mortgage: such clerk shall indorse on such mortgage or copy the time of receiving the same, and keep the same in his office for the inspection of all persons; such clerk shall also enter at the time of filing, in a book properly ruled and kept therefor, the names of all the parties, arranging mortgagors alphabetically, the date of each mortgage, and the date of filing the same, and of each affidavit relating thereto. Mortgages so filed shall be as valid and binding upon all persons as if the property thereby mortgaged had been immediately upon the execution of such mortgage delivered to, and the possession thereof retained by, the mortgagee.²

¹ R. S. 1878, ch. 105, §§ 2313–2318.

² No contract for the sale of personal property by the terms of which the title is to remain in the vendor, and the possession thereof in the vendee until the purchase price is paid, or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof, unless such contract shall be in writing, subscribed by the parties, and the same or a copy thereof shall be filed in the office of the clerk of the town, city, or village where the vendee resides, or, if he shall not be a resident of the state, then in the office of the clerk of the town, city, or village where the property may be at the time of making such contract; and such clerk shall file, keep, and index the same in like manner as mortgages of personal property, and receive a like compensation therefor; but the effect of such filing shall not extend for more than one year after the time fixed for payment of the contract

price, or for the performance of the other conditions of such sale.

A copy of any such mortgage or other instrument, or of any copy thereof, so filed, including any affidavits annexed thereto in pursuance of this statute, certified by the clerk in whose office the same shall be filed, shall be received in evidence, but only of the fact that such instrument, copy, or affidavit was received and filed according to the indorsement of the clerk thereon, and of no other fact.

All mortgages, liens, bills of sale, or other written instruments, in any way affecting the ownership of any marked logs in any lumber district, which shall specify the marks placed upon said logs and when they were cut, shall be recorded in the office of the lumber inspector in which said marks are recorded; and no such conveyance, lien, mortgage, or transfer shall be valid, except as to the parties thereto, until the same is so recorded, or until the same shall be filed with some

Every such mortgage shall cease to be valid as against the creditors of the person making the same, or subsequent purchasers or mortgagees in good faith, after the expiration of two years from the filing of the same, or a copy thereof, unless within thirty days next preceding the expiration of the two years the mortgagee, his agent or attorney, shall make and annex to the instrument, or copy on file, an affidavit setting forth the interest which the mortgagee has by virtue of such mortgage in the property therein mentioned, upon which affidavit the clerk shall indorse the time when the same was filed.¹ The effect of any such affidavit shall not continue beyond two years from the time when such mortgage would otherwise cease to be valid as against subsequent purchasers or mortgagees in good faith; but within thirty days next preceding the time when any such mortgage would otherwise cease to be valid as aforesaid, a similar affidavit may be filed and annexed as before provided, and with the like effect.

235. Wyoming Territory.² — Every mortgage, bond, conveyance, or other instrument intended to operate as a mortgage, of goods, chattels, and personal property, shall be executed and acknowledged in the same manner as provided for the execution and acknowledgment of conveyances of land. Every such mortgage bond, or conveyance which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the goods, chattels, and personal property mortgaged, shall be absolutely void as against the creditors of the mortgagor and subsequent purchasers and mortgagees in good faith, unless such mortgage or conveyance shall be recorded. Every such mortgage, bond, or conveyance shall be recorded in the office of the county clerk of the county where the property is. But in cases of mortgages of cattle, horses, mules, sheep, and other live stock, it shall be sufficient if such mortgage, bond, conveyance, or instrument intended to operate as a mortgage is re-

lumber inspector, who shall immediately forward such instrument to the inspector of the proper district. Such filing and recording of all such instruments and papers shall have the same effect as notice that the recording of deeds and mortgages in the office of the register of deeds has. R. S. 1878, ch. 84, § 1739.

¹ See § 293. A failure to observe this provision only makes the mortgage invalid as to subsequent purchasers and mortgagees in good faith, or creditors who may thereafter seize the property. *Rockwell v. Humphrey*, 57 Wis. 410, 421.

² R. S. 1887, §§ 70-79.

corded in the county wherein the range upon which such cattle, horses, mules, sheep, and other live stock are or shall be principally running or ranging is located.¹ In case of the removal of the mortgaged property during the term or validity of the mortgage or conveyance to some other county by the consent of the mortgagee, the mortgage or conveyance shall thereupon be immediately recorded in the county to which the property is removed.² Every such mortgage or conveyance shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to all creditors and subsequent purchasers and mortgagees in good faith without notice; and all such mortgages or conveyances shall be void as to all such creditors and subsequent purchasers and mortgagees without notice, whose mortgages or conveyances shall be first recorded: provided that such mortgages or conveyances shall, without such record, be valid between the parties.

Every such mortgage, bond, instrument, or conveyance intended to operate as a mortgage, recorded in pursuance of this act, shall remain in full force and validity for the term for which it shall have been given, and for two months thereafter. Every such mortgage, bond, instrument, or conveyance so recorded shall cease to be valid as against the creditors of the person making the same, and as against subsequent purchasers or mortgagees in good faith, after the expiration of two months from and after the end of the term for which it shall have been given, unless before the expiration of the two months aforesaid the mortgagee, his agent or attorney, shall make an affidavit, exhibiting the interest of the mortgagee at the time last aforesaid in such mortgage, bond, conveyance, or instrument intended to operate as a mortgage; and if said mortgage is to secure the payment of money, the amount due and unpaid; and such affidavit shall be recorded in all respects as the original mortgage is by this act required to be recorded; and a like affidavit which shall have the same effect may be recorded each succeeding year; and the original mortgage shall then continue to be in full force and virtue for the term of

¹ Laws 1882, ch. 11, § 3.

This statute by § 77 provides that it shall be a sufficient description of such cattle, horses, etc., to set forth their marks or brands, together with the ranches or ranges upon which they are.

² This section does not apply to any live stock, horses, or mules temporarily used or being driven, or grazed in a county other than that in which the herd to which they may belong is permanently located. R. S. 1887, § 73.

one year from the time of recording such affidavit. And it shall be the duty of the county clerk in whose office the original instrument was originally recorded, upon the recording in his office of the affidavit hereinbefore required, to note upon the margin of such original record the recording of such affidavit, and all subsequent affidavits of renewal, together with a reference to the volume and page where such affidavit of renewal is recorded.¹ Every such mortgage or conveyance so recorded shall cease to be valid as against the creditors of the person making the same, or as against subsequent purchasers or mortgagees in good faith, after the expiration of two months from and after the end of the term for which it shall have been given, unless the same shall be renewed and continued, or unless, before the expiration of the two months aforesaid, notice of foreclosure shall have been given: provided, that such mortgage shall nevertheless continue to be valid between the parties.

¹ Laws 1882, ch. 11, § 6.

CHAPTER VII.

RECORDING, FILING, AND REFILING.

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I. The Effect of Recording or Filing a Chattel Mortgage.

236. The recording or filing of a mortgage is generally equivalent to a change of possession, under the statutes providing for such record or filing, and relieves the party claiming under the mortgage from the burden of proving the *bonâ fides* of the transaction.¹ "Some things must be considered as settled in the law respecting the mortgage of personal property; and although the law, as it stands, may be supposed to operate as a temptation to parties to commit frauds, and to enable them to do so successfully, yet the danger of fraud is intrinsic and incident to the nature of the subject. . . . We must take it as settled that a mortgage of a chattel vests a property in the mortgagee; not an absolute title, indeed, but a present title, defeasible upon a condition subsequent. An actual delivery and change of possession are not necessary to perfect the mortgagee's title, if the mortgage is duly recorded; the registration of the mortgage supersedes the necessity of an actual delivery, and gives all parties concerned constructive notice of its execution and existence. It seems to follow, as a necessary consequence, that goods mortgaged

¹ Robinson v. Elliott, 22 Wall. 513; 79 Mo. 464; Feurt v. Rowell, 62 Mo. 524. Crooks v. Stuart, 2 McCrary, 13. Massachusetts: Forbes v. Parker, 16 Pick. 462; Bullock v. Williams, Ib. 33. Wisconsin: Cotton v. Marsh, 3 Wis. 221; Donaldson v. Johnson, 2 Chand. 160; Harrington v. Brittan, 23 Wis. 541. Maine: Morrill v. Sanford, 49 Me. 566. Missouri: Miller v. Whitson, 40 Mo. 97; State v. Cooper, 79 Mo. 464; Alabama: Whittleshoffer v. Strauss, 3 So. Rep. 524; Smith v. Fields, 79 Ala. 335; Heflin v. Slay, 78 Ala. 180. California: Berson v. Nunan, 63 Cal. 550; Moore v. Murdock, 26 Cal. 514. Maryland: Cahoon v. Miers, 67 Md. 573. Minnesota: Keenan v. Stimson, 32 Minn. 377. Iowa: Fromme v. Jones, 13 Iowa, 474.

may be safely left by the mortgagee in the custody of the mortgagor, without the former's being chargeable with laches. Indeed, the most common object of such a mortgage is to enable the mortgagor to give security on the goods, and yet for the time being to retain the custody and use of them."¹

When it is said that registration is a substitute, as well for a delivery as for retaining possession, it is to be understood that the mortgaged property is of such a nature and so situated as to be capable of being specifically designated and identified by description. If it requires to be weighed, measured, counted off, or otherwise separated from other like property, such requisites are not to be considered as dispensed with by registration.²

While registration dispenses with delivery and possession, on the other hand delivery and possession dispense with the necessity of a record.³

It is to be observed, however, that the statutes of several states do not make the recording or filing of chattel mortgages legally equivalent to an actual delivery and continued change of possession of the property. In these states the retaining of possession by the mortgagor is in all cases, whether the mortgage be recorded or not, *prima facie* a badge of fraud; and this presumption is only overcome by proof of the good faith of the transaction. The statute, in fact, "only adds another to the grounds on which a mortgage of personal chattels shall be void."⁴ Such is the case in New York, Minnesota,⁵ Nebraska,⁶ and some other states.

237. A mortgage is good between the parties to it, although it does not conform to requirements of the statute relating to acknowledgment, record, or the like.⁷ The statutes make such a

¹ *Coles v. Clark*, 3 Cush. (Mass.) 399, per Chief Justice Shaw.

² *Bullock v. Williams*, 16 Pick. (Mass.) 33, per Shaw, C. J.

³ *Fromme v. Jones*, 13 Iowa, 474; *Cooper v. Brock*, 41 Mich. 488; *Morrow v. Reed*, 30 Wis. 81; *Cass v. Rothman*, 42 Ohio St. 380.

⁴ *Wood v. Lowry*, 17 Wend. (N. Y.) 492, per Bronson, J.

⁵ *Horton v. Williams*, 21 Minn. 187.

⁶ *Marsh v. Burley*, 13 N. W. Rep. 279. See § 398.

⁷ *Winsor v. McLellan*, 2 Story, 492; *Sawyer v. Turpin*, 91 U. S. 114; *S. C.* 13 N. Bank. R. 271; *Stewart v. Platt*, 101 U. S. 731. **Arkansas:** *Jacoway v. Gault*, 20 Ark. 190; *Watson v. Thompson Lumber Co.* 4 S. W. Rep. 62; *Lemay v. Williams*, 32 Ark. 166. **Illinois:** *Davis v. Ransom*, 26 Illinois, 100; *Griffin v. Wertz*, 2 Bradw. 487; *Fuller v. Paige*, 26 Ill. 358; *Forest v. Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 Ill. 478; *Badger v. Batavia Paper Manuf. Co.* 70 Ill. 302; *Frank v. Miner*, 50 Ill. 444. **Maine:** *Bee-*

mortgage void only against persons other than the parties to it, or as to purchasers, mortgagees, and creditors of the mortgagor without notice. The only effect of delay in recording or filing a mortgage is to render it void as against intervening purchasers or mortgagees, or creditors obtaining liens by attachment, judgment, or execution.¹ If the time within which a mortgage must be recorded or filed be not expressly prescribed by statute, it is sufficient that this be done at any time before possession is taken or interests or liens are acquired by others, no matter how long this be after the execution of the mortgage. The record of a mortgage being only a substitute for the mortgagee's possession, it follows that, in the absence of any record, possession taken by the mortgagee before others have acquired any interest in the property makes his mortgage lien complete.²

A mortgage though not recorded vests the general property in the mortgagee, and when there is no stipulation to the contrary, the right also to the immediate possession of the property; and therefore he may maintain an action of tort against one who, without any title, takes the property from the mortgagor's possession.³ The recording acts do not attempt to make a mortgage absolutely void for an omission to record or file it, but simply declare that such omission renders it void as to creditors and subsequent purchasers in good faith.⁴

An unfiled mortgage on property subsequently brought by the

man *v.* Lawton, 37 Me. 543. **New York:** Hayman *v.* Jones, 7 Hun, 238; Wescott *v.* Gunn, 4 Duer, 107; Pancoast *v.* Am. Heating, &c. Co. 66 How. Pr. 49. **Maryland:** Hudson *v.* Warner, 2 Har. & G. 415; Claggett *v.* Salmon, 5 G. & J. 314. **Indiana:** McTaggart *v.* Rose, 14 Ind. 230. **Ohio:** Kilbourne *v.* Fay, 29 Ohio St. 264; Wilson *v.* Leslie, 20 Ohio, 161. **New Hampshire:** Smith *v.* Moore, 11 N. H. 55. **New Jersey:** Williamson *v.* N. J. Southern R. R. Co. 26 N. J. Eq. 398; Hall *v.* Snowhill, 14 N. J. L. 8. **California:** Hackett *v.* Manlove, 14 Cal. 85. **South Carolina:** McGowan *v.* Reid, 3 S. E. Rep. 337. **Georgia:** Janes *v.* Penny, 76 Ga. 796. **North Carolina:** Williams *v.* Jones, 95 N. C. 504. **Nebraska:** Fitzgerald *v.* Andrews, 15 Neb. 52. **Minnesota:** McNeil *v.* Finnegan, 33 Minn. 375. **Texas:** Keller *v.*

Smalley, 63 Tex. 512. **Missouri:** Johnson *v.* Jeffries, 30 Mo. 423. **Colorado:** Machette *v.* Wanless, 2 Colo. 169.

¹ Smith *v.* Acker, 23 Wend. (N. Y.) 653; Wescott *v.* Gunn, 4 Duer (N. Y.), 107; Hayman *v.* Jones, 7 Hun (N. Y.), 238; Stephenson *v.* Browning, 48 Ill. 78; Gaff *v.* Harding, 48 Ill. 148.

² Sawyer *v.* Turpin, 91 U. S. 114; Craigin *v.* Carmichael, 2 Dill. 519; Crooks *v.* Stuart, 2 McCrary, 13, 15; 7 Fed. Rep. 800; Lyon *v.* Council Bluffs Sav. Bank, 29 Fed. Rep. 566; Mitchell *v.* Black, 6 Gray (Mass.), 100.

³ Pratt *v.* Harlow, 16 Gray (Mass.), 379; Brackett *v.* Bullard, 12 Met. (Mass.) 308; Moses *v.* Walker, 2 Hilt. (N. Y.) 536; Johnson *v.* Jeffries, 30 Mo. 423.

⁴ Hayman *v.* Jones, *supra*.

mortgagor into a firm of which he becomes a member, as his proportion of the capital, is not invalid as to the other partners by reason of its not being filed. The property in such case comes into the firm impressed with the lien of the mortgage.¹

But if the other partners had no knowledge of such mortgage they should be regarded as purchasers. The partner contributing the property upon its becoming partnership property ceased to have any individual interest in any portion of the property. The mortgage has no force as against the other partners, or as against others who subsequently became partners. It binds only whatever interest the mortgagor may have in the property after a settlement of the partnership affairs.²

A claim for insurance money under a policy made payable to a mortgagee is not invalidated by failure to file or record the mortgage.³

238. As between the parties a mortgage is not invalidated because it is fraudulent as to the mortgagor's creditors.⁴ Even a statute making the giving of such a mortgage a criminal offence in both parties does not make it void between the parties when duly executed and recorded.⁵ The contract being completed, the law will not lend its aid to either party to compel the other to restore him to the condition he was in before the transaction was entered upon. The title to the property passes to the mortgagee as between the parties, and he may maintain an action for a fraudulent conversion of it.⁶

239. An unfiled or unrecorded mortgage is valid against the executor or administrator of the mortgagor in the same way that it is valid against the mortgagor himself.⁷ The undisputed rule in regard to an unrecorded mortgage of real estate is, that it is valid against the heirs and representatives of the mort-

¹ *Rust v. Hauselt*, 46 N. Y. Superior Ct. 22.

² *Ringo v. Wing* (Ark.), 5 S. W. Rep. 787; *Bank v. Sawyer*, 38 Ohio St. 339; *Tarbell v. West*, 86 N. Y. 280, 289; 1 Jones on Mortgages, §§ 119, 120.

³ *Coykendall v. Ladd*, 32 Minn. 529.

⁴ *Brown v. Webb*, 20 Ohio, 382; Trem-

per *v. Barton*, 18 Ohio, 418; *Gooding v. Riley*, 50 N. H. 400, 406, per Bellows, C. J.

⁵ *Andrews v. Marshall*, 48 Me. 26.

⁶ *Andrews v. Marshall*, *supra*.

⁷ *Griffin v. Wertz*, 2 Bradw. (Ill.) 487; *Sumner v. McKee*, 89 Ill. 126; *Evans v. Pence*, 78 Ind. 439.

gagor, equally as against the mortgagor himself.¹ "When it is considered that the real estate of a deceased debtor is, to the extent needed to supply the insufficiency of the personal property to pay the debts of the estate and expenses of administration, assets in the hands of the executor or administrator, how is it possible that a real mortgage, not left for record until after the death of the mortgagor, can be valid and binding against his general creditors, unless an unfiled mortgage of personalty is also valid?"² That the rule is precisely the same in the two cases seems perfectly clear. Neither the heir in one case, nor the administrator in the other, is a third person, but represents the intestate and has no better title than he had.

A mortgage may be recorded after the death of the mortgagor.³

240. But where the estate of the deceased mortgagor is insolvent, it has been held in some cases that his unfiled or unrecorded mortgage is void as against his personal representative into whose hands the possession of the property passes directly from the deceased mortgagor.⁴ These decisions proceed upon the ground that when the estate of the mortgagor is insolvent, his executor or administrator virtually represents the creditors; so that the unrecorded mortgage then comes in contest with the creditors. It is contended that the mortgage is inoperative and void as to creditors for want of filing, and that the property covered by it drops into and becomes general assets, to be administered for their benefit. Against this view it seems a sufficient answer that a general creditor cannot question the validity of an unfiled mortgage until he has obtained a lien upon it by attachment or execution. Until he has seized the property by some process of law, the unfiled mortgage upon it is equally valid against the mortgagor's creditor as it is against the mortgagor himself. The mortgagor's death gives no specific lien upon his property in favor of a general creditor. The property passes to the personal representative as the mortgagor left it. One who was a mere general creditor before the death remains such after it. His position

¹ Gill v. Pinney, 12 Ohio St. 38; Jones on Mortgages, § 545.

² Kilbourne v. Fay, 29 Ohio St. 264, 291, per Boynton, J., dissenting.

³ Williams v. Jones, 95 N. C. 504.

⁴ Kilbourne v. Fay, *supra*. Followed in

Becker v. Anderson, 11 Neb. 493. This was the decision of a majority of the court; but two of the five judges dissented and concurred in a dissenting opinion, which is clearly the opinion best supported both by authority and reason.

with respect to other creditors remains unchanged. He and they have the same right, through the intervention of an administrator, to subject to the payment of their debts, if necessary, all the property of their debtor which has passed to his heirs, devisees, or legatees. This right, which constitutes the only lien which a general creditor has upon the estate of his deceased debtor, is acquired by no act of diligence on the part of the creditor; it arises from no act of the debtor, but from the laws that make the property he has at the time of his death subject to the payment of his debts. This right of the general creditor is limited to the property that passes; and it is limited also to the property in the condition in which it passes, subject to the incumbrances and liens placed upon it by the debtor.¹

241. An assignee in bankruptcy or insolvency takes only the debtor's rights, in the absence of fraud in fact; and consequently is affected with all the claims, liens, and equities which would affect the debtor if he were himself asserting his interest in the property. This is the doctrine generally recognized in England and in this country. "Assignees in bankruptcy," said Sir William Grant,² "take subject to whatever equity the bankrupt was liable to. They are not considered purchasers for valuable consideration in the proper sense of the words." And Lord Hardwicke had in an earlier case said:³ "The ground that the court go upon is this: that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could." Judge Story, following this doctrine, held a mortgage effectual against an assignee in bankruptcy although it had not been duly recorded at the date of the bankruptcy;⁴ and the doctrine has since been affirmed in this country in numerous decisions;⁵ and recent de-

¹ *Gill v. Pinney*, 12 Ohio St. 38, 47, per Scott, C. J., and substantially his language; and see dissenting opinion of Boynton, J., in *Kilbourne v. Fay*, *supra*.

² *Mitford v. Mitford*, 9 Ves. 87; affirmed in *Sherrington v. Yates*, 12 M. & W. 855.

³ *Brown v. Heathcote*, 1 Atk. 160, 162.

⁴ *Winsor v. McLellan*, 2 Story, 492; *Fletcher v. Morey*, 2 Story, 555; *Mitchell v. Winslow*, 2 Story, 630.

⁵ *Stewart v. Platt*, 101 U. S. 731; *In re Griffiths*, 1 Lowell, 431; *In re Dow*, 6 N. Bank. R. 10; *Coggeshall v. Potter*, 1 Holmes, 75; *S. C.* 4 N. Bank. R. 73; *In re Wynne*, 4 Ib. 23; *Johnson v. Patterson*, 2 Woods, 443; *Goddard v. Weaver*, 1 Woods, 257, 260; *In re Collins*, 12 N. Bank. R. 379; *Platt v. Preston* (Dist. Ct. N. Y. 1880), 8 Fed. Rep. 394; *Curry v. McCauley*, 11 Fed. Rep. 365; *Scott v. Al-*

cisions of the Supreme Court of the United States have definitely and conclusively settled the doctrine in the federal courts, and swept away the authority of many contrary decisions rendered in late years by the Circuit and District Courts. In *Yeatman v. Savings Institution*¹ the Supreme Court declared it to be an established rule under the bankrupt law, that, except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by any act of the bankrupt, which existed against the property in the hands of the bankrupt. In the later case of *Stewart v. Platt*² this general principle was applied to the subject under discussion; and it was held that a chattel mortgage not filed in accordance with the registry laws, but valid and effective as between the parties, was equally valid and effective as against the mortgagor's assignee in bankruptcy.

ford, 53 Tex. 82; *Case Threshing Machine Co. v. Campbell* (Oreg.), 13 Pac. Rep. 324.

¹ 95 U. S. 764; approved in *Hauselt v. Harrison*, 105 U. S. 401, 406.

² 101 U. S. 731; *S. C.* 11 N. Bank. R. 347. Mr. Justice Harlan, delivering the opinion of the court, said: "Although the chattel mortgages, by reason of the failure to file them in the proper place, were void as against judgment creditors, they were valid and effective as between the mortgagors and the mortgagee. Suppose the mortgagors had not been adjudged bankrupts, and there had been no creditors, subsequent purchasers, or mortgagees in good faith, to complain, as they alone might, of the failure to file the mortgages in the towns where the mortgagors respectively resided; it cannot be doubted that Stewart, in that event, could have enforced a lien upon the mortgaged property in satisfaction of his claim for rent. The assignee took the property subject to such equities, liens, or incumbrances as would have affected it had no adjudication in bankruptcy been made. While the rights of creditors, whose executions preceded the

bankruptcy, were properly adjudged to be superior to any which passed to the assignee by operation of law, the balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee, for the purposes of his trust. The latter, representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagors. The assignee can assert in behalf of the general creditors no claim to the proceeds of the sale of that property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagors and the mortgagees, the chattel mortgages were and are unimpeachable for fraud, or upon any other ground recognized in the bankrupt law." Approved in *Hauselt v. Harrison*, *supra*; and see *Platt v. Preston* (Dist. Ct. N. Y. 1880), 3 Fed. Rep. 394; *Lloyd v. Foley*, 11 Fed. Rep. 410; *National Shoe & Leather Bank v. Small* (D. C. Me. 1881), 7 Fed. Rep. 837; *In re Collins*, 8 Ben. 59.

A mortgage valid under the laws of the state where it was executed is valid to the same extent under a national bankrupt act.¹

242. The contrary doctrine has had much support. Where this prevails it is declared that an unrecorded mortgage of chattels not delivered is not valid against an assignee in insolvency of the mortgagor.² "At common law a mortgage of personal property without delivery, would stand on no better ground than any other sale; and the policy of the law in requiring registration could hardly be made effectual under the provisions of the insolvent law, if assignees were not allowed to take for the benefit of creditors property which the creditors themselves might have taken on execution, or which the debtor might have conveyed to them in satisfaction of their debts."³ The assignee is regarded as representing and standing in the place of the creditors as well as the bankrupt; and as representing creditors, he has a stronger right than the bankrupt, and therefore may contest claims and rights to property which the bankrupt could not contest.⁴

Upon the same ground, the receiver of an insolvent corporation has been allowed to avoid an unrecorded chattel mortgage upon the property of the corporation.⁵

¹ *Johnson v. Patterson*, 2 Woods, 443; *In re Griffiths*, 1 Lowell, 431.

² *Re Werner*, 5 Dill. 119; *Miller v. Jones*, 15 N. Bank. R. 150; *Re Gurney*, Ib. 373; *S. C.* 7 Biss. 414; *Re Leland*, 10 Blatchf. 503; *Barker v. Smith*, 12 N. Bank. R. 474; *In re Collins*, 12 Blatchf. 548; *In re Eldridge*, 2 Biss. 362; *Platt v. Stewart*, 13 Blatchf. 481; *Bank of Leavenworth v. Hunt*, 11 Wall. 391; *Moore v. Young*, 4 Biss. 128; *Allen v. Massey*, 4 N. Bank. R. 248; *In re Wynne*, Ib. 23; *Brock v. Terrell*, 2 Ib. 643; *Adams v. Merchants' Nat. Bank*, 2 Fed. Rep. 174, 180, per Drummond, J.; *Goodrich v. Michael*, 3 Colo. 77; *Bingham v. Jordan*, 1 Allen (Mass.), 373. The case of *Bank of Leavenworth v. Hunt*, *supra*, is placed upon the ground that the mortgage was fraudulent as against creditors, though the language of Mr. Justice Field favors the view above.

These decisions, so far as they relate to

the United States bankrupt laws, are overruled by the decisions of the Supreme Court cited in the preceding section.

³ *Bingham v. Jordan*, 1 Allen (Mass.), 373, per Hoar, J. The insolvent law of Massachusetts, under which this decision was rendered, differs from the bankrupt acts of the United States of 1841 and 1867, in that the assignee in insolvency takes not only all the debtor's property, but all that could be taken on execution against him at the time of the insolvency; and a creditor could levy upon chattels covered by an unrecorded mortgage although he had actual notice of it. *Denny v. Lincoln*, 13 Met. (Mass.) 200.

⁴ *In re Gurney*, 7 Biss. 414; *Brackett v. Harvey*, 25 Hun (N. Y.), 502; *Southard v. Benner*, 72 N. Y. 424.

⁵ *Farmers' Loan & Trust Co. v. Minneapolis, &c., Works*, 35 Minn. 543.

243. Possession taken under a mortgage, or a record of it made shortly before the insolvency or bankruptcy of the mortgagor, is sufficient to protect the mortgagee, if it could not be objected to as being a preference at the time of its execution, although it would be open to this objection if it had been executed at the time it was recorded, or possession was taken under it. The mortgage is valid between the parties without either record or possession, if it be made at a time when the law imposes no restriction upon the dealings of the parties with reference to creating a preference, although the mortgagee delays to record it, or to take possession under it, until a short time before the mortgagor's insolvency, when the law would prohibit the making of the mortgage as a preference; yet the mortgage may then be made effectual by the mortgagee's recording it or taking possession under it, because he only asserts and makes secure a right which he had previously acquired.¹

If it be said that the mortgagee's failure to record his mortgage or to take possession under it enabled the debtor to maintain a credit which he ought not to have enjoyed, the answer is, that bankrupt and insolvent acts are not intended to prevent false credits, but to insure a ratable distribution of the debtor's property.²

It follows, too, from the same principles, that if a mortgage be taken in exchange for some other valid security within a short time of the debtor's bankruptcy, when the creditor knew he was insolvent, and when the mortgage would be void as a preference, if the transaction had then first been entered upon, it will nevertheless be valid.³ The exchange takes nothing from the other

¹ Mitchell v. Black, 6 Gray (Mass.), 100; Sawyer v. Turpin, 91 U. S. 114; Matthews v. Westphal, 1 McCrary, 446; Bean v. Brookmire, 1 Dill. 24; Anibal v. Heacock, 2 Fed. Rep. 169.

See *contra*, *Re Eldridge*, 2 Biss. 362; *Harvey v. Crane*, *Ib.* 496; *In re Hussman*, 2 N. Bank. R. 437; *In re Manly*, 3 *Ib.* 291; *Foster v. Hackley*, 2 *Ib.* 406; *Bean v. Amsink*, 8 *Ib.* 228; *Seaver v. Spink*, *Ib.* 218; *In re Morrill*, *Ib.* 117; *Harris v. Exchange Nat. Bank*, 4 Dill. 133. The latter case is expressly overruled in *Matthews v. Westphal*, *supra*. And see *Hauselt v. Harrison*, 105 U. S. 401.

These contrary decisions, which are regarded as erroneous, hold that possession taken by a mortgagee under an unrecorded mortgage, before the commencement of proceedings in bankruptcy, but within four months of that time, operates as a preference, and leaves the mortgage void as against creditors, and equally void as against the assignee in bankruptcy.

² Sawyer v. Turpin, 91 U. S. 114; *S. C.* 13 N. Bank. R. 271, per Strong, J.

³ Sawyer v. Turpin, *supra*; *Cook v. Tullis*, 18 Wall. 332, 340; *Clark v. Iselin*, 21 Wall. 360; *Watson v. Taylor*, 21 Wall. 378; *Burnhisel v. Firman*, 22 Wall.

creditors. Neither is it necessary that such mortgage be recorded, or possession taken under it immediately, if this be done before the debtor's bankruptcy.¹ Neither does it matter that the mortgage is retained from record and kept secret under an agreement of the parties to that effect.²

244. An unrecorded mortgage is good at law against a general assignment for the benefit of creditors, for such assignee is not a purchaser.³ This question was raised in a recent case in Michigan, but left undecided. The assignee took possession, and proceeded to make sale of the goods in execution of his trust. Thereupon the mortgagee filed a bill in equity to foreclose his mortgage. But it was held that inasmuch as the statute declared the mortgage void as against the very parties for whom the assignee was trustee, he had no standing in equity, and his bill was dismissed.⁴ If under any strict rule of common law the mortgagee would have the advantage, he will be left to seek this at law.

Under a statute of the State of Ohio, rendering it necessary to the validity of a mortgage to indemnify a surety that a statement of such liability shall be entered thereon and verified by oath, it was held that a mortgage void as to creditors for want of such statement is void as against an assignee in trust for the benefit of creditors.⁵ It was contended that as the mortgage was good

170; *Stevens v. Blanchard*, 3 Cush. (Mass.) 169; *National Shoe & Leather Bank v. Small* (D. C. Me. 1881), 7 Fed. Rep. 837.

¹ *Sawyer v. Turpin*, 91 U. S. 114.

² *Sawyer v. Turpin*, *supra*, per Strong, J.

³ *Keller v. Smalley*, 63 Tex. 512; *Roberts v. Austin*, 26 Iowa, 315, 327; *Williams v. Winsor*, 12 R. I. 9; *Wilson v. Esten*, 14 R. I. 621; *Wakeman v. Barrows*, 41 Mich. 363; *Hawks v. Pritzlaff*, 51 Wis. 160; *Shaw v. Glen*, 37 N. J. Eq. 32; *Van Heusen v. Radcliff*, 17 N. Y. 580; *Simon v. Openheimer*, 20 Fed. Rep. 553, 558; *Rumsey v. Town*, *ib.* 558.

⁴ *Putnam v. Reynolds*, 44 Mich. 113; *S. C. 6 N. W. Rep.* 198. Judge Cooley, delivering the opinion of the court, said upon the latter point: "It is insisted on behalf of complainant that his mortgage,

notwithstanding the failure to file it, was perfectly good as against the mortgagor, and that the latter could not, by a voluntary assignment, transfer a right to assail it which he did not himself possess. The assignee is not a purchaser for value, and not a creditor; and even creditors, it is said, cannot attack the mortgage, except indirectly, through a seizure of the property by attachment or other suitable process. This is doubtless true where the invalidity of the mortgage arises from the fraud of the mortgagor, but whether the same rule will apply when the mortgage was originally valid, but is made void by the neglect of the mortgagee, may well be questioned."

⁵ *Hanes v. Tiffany*, 25 Ohio St. 549. So in *Lockwood v. Slevin*, 26 Ind. 124.

against the mortgagor, it was good also against his assignee for the benefit of creditors; that the latter stands in no better situation than his assignor. "The correctness of this position at common law is admitted; but not so under the statute. The mortgagee not having possession of the mortgaged property, the statute declares the mortgage void as against the creditors of the mortgagor. The assignee took the property under the assignment, and held it for the exclusive benefit of creditors. The mode of providing for creditors by way of assignment, in trust for their benefit, is recognized and regulated by statute; and we see no good reason why their rights may not be as effectually asserted through the assignee as they could be by judgment and execution, in case there had been no assignment.¹

245. As against general creditors, having no lien by attachment, an unrecorded mortgage is valid and conclusive, unless it can be impeached as fraudulent, or as giving a preference under a bankrupt or insolvent law.² But in New York it is held that a mortgage not duly filed is void as against a general creditor whose claim has accrued during the continuance of the default in filing the mortgage, although the creditor is not in a position to raise the question until he has obtained judgment or process against the property. The object of the act is to prevent the setting up of secret mortgages against persons who may deal with the mortgagor, on the faith that his property is not thus incumbered. Therefore when a creditor has obtained judgment and execution, he may go back to the origin of the debt, and show, if he can, that when it was contracted the incumbrance with which he is then confronted was kept secret by being withheld from registry.³

¹ *Hanes v. Tiffany*, 25 Ohio St. 549, per White, J. Under the act of this state regulating general assignments, the interest of the mortgagor, whatever it may be, passes by the assignment. When such an assignment is made by a mortgagor in possession, the mortgagee cannot maintain an action against the assignee for a conversion of the property. In such case, his interest in the property is transferred to the fund arising from the sale of the property by the assignee. It is immaterial that

the condition of the mortgage was broken at the time of the assignment. *Lindemann v. Ingham*, 36 Ohio St. 1.

² *Overstreet v. Manning*, 67 Tex. 657; 4 S. W. Rep. 248, 251; *Brothers v. Mundell*, 60 Tex. 240; *Grace v. Wade*, 45 Tex. 522, 527.

³ § 345; *Thompson v. Van Vechten*, 27 N. Y. 568; *Stewart v. Beale*, 7 Hun, 405, affirmed 68 N. Y. 629; *Fraser v. Gilbert*, 11 Hun, 634; *Brackett v. Harvey*, 25 Hun, 502; *Clark v. Gilbert* (C. P.

The creditor must not only have obtained judgment and execution, but he must actually have levied upon the property, before he can justify his possession of the property as against the mortgagee, or can take the possession of it from him.¹

Moreover, the right to preference over the unfiled mortgage attaches itself to the debt, and accompanies it when transferred in the course of the negotiation of commercial paper.²

After a creditor had obtained judgment, and issued execution to the sheriff in the county where chattels of the debtor covered by an unfiled mortgage were situate, the mortgagee applied for and obtained the appointment of a receiver of the property, and thus prevented the judgment creditor from levying his execution and satisfying his judgment. The moneys received from a sale of the property having been paid into court for distribution by it as a court of equity, it was held that the court was bound to preserve the rights of the judgment creditor, and award the fund to him.³

The latest cases in New York upon this subject more strongly assert that one not having a judgment and execution is not a creditor within the meaning of the provision of the statute declaring that the omission to file a chattel mortgage renders it void as against creditors of the mortgagee and subsequent purchasers or mortgagees in good faith.⁴

This view is also fully asserted in recent cases in other states.⁵

1882), 14 Week. Dig. 241; *Niagara Co. Nat. Bank v. Lord*, 33 Hun, 557; *Button v. Rathbone*, 43 Hun, 147; *Ebling v. Husson*, 22 J. & S. (N. Y.) 377.

¹ *Grasmuck v. Baur*, 12 Daly, 180; *Osborn v. Alexander*, 40 Hun, 323.

² *Thompson v. Van Vechten*, 27 N. Y. 568.

³ *Stewart v. Beale*, 7 Hun (N. Y.), 405; affirmed 68 N. Y. 629; *Button v. Rathbone*, *supra*.

⁴ *Jones v. Graham*, 77 N. Y. 628; *Kennedy v. Nat. Union Bank*, 23 Hun, 494. And see *Hayman v. Jones*, 7 Hun, 238.

⁵ *Overstreet v. Manning*, 67 Tex. 657; 4 S. W. Rep. 248, 251; *Grace v. Wade*, 45 Tex. 522, 527; *Gill v. Pinney*, 12 Ohio St. 38; *Ransom v. Schmela*, 13 Neb. 77; 15 Rep. 19; 12 N. W. Rep. 926; *Cameron v. Marvin*, 26 Kans. 612, 627. Mr. Justice

Valentine, delivering the opinion in the latter case, said:—

“Of course, a chattel mortgage not recorded of property not delivered is void as against all creditors who have no notice of the mortgage; but they have no right to or interest in any specific property until they have obtained this right or interest by some legal process. They have no more right to the property than the mortgagee has whose mortgage is void. They all have an equal right to the property,—that is, they all have a right to procure a lien upon it or an interest in it by virtue of legal process, or chattel mortgage, or purchase; and the one who first acts will obtain the prior right in and to the property. If one of the creditors already has a chattel mortgage upon the property, he may file his mortgage or procure posses-

Where a judgment is not a lien upon the debtor's personal property, a mortgage executed and recorded after a judgment, and before the issuing of an execution upon it, takes precedence of it.¹

A judgment creditor is estopped from objecting to a mortgage on the ground that it is not filed, by agreeing with the mortgagee that the property should be sold free from all incumbrances, and that the latter should be first paid out of the proceeds, even though he was ignorant of the defect at the time of the agreement.²

Creditors of an insolvent estate, who are entitled to a ratable distribution of the assets of the decedent, have a lien thereon, which entitles them to a standing to contest the validity of a chattel mortgage not properly filed.³

245 a. As between recorded mortgages, priority of record generally determines the priority of lien. This is the rule though both mortgages be given to indemnify the mortgagees. The lien of such a mortgage begins with its execution and delivery, and not with the payment of the debt indemnified against, and therefore priority depends upon priority of record, as in other cases.⁴

By agreement or understanding of all the parties interested, a mortgage which is first recorded may be postponed to a mortgage afterwards recorded; or two mortgages recorded at different times may be regarded as one mortgage securing debts to the different mortgagees, and without priority as to each other.⁵

sion of the property; and if he has done this with the consent of the mortgagor, he has certainly obtained the right to the property. The mortgagor has a continuing right to mortgage his property to secure his debts as long as he acts in good faith and does not mortgage property already mortgaged to others. He has a right to prefer one creditor over another; and he may prefer any one of his creditors over any of the others, and if the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mortgagor, or takes possession of the property with the consent of the mortgagor, his mortgage, then, has

the force and effect of a mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the same parties and recorded. The old mortgage is then given life and force, and by the joint action of both the parties, and hence must be held to be valid from that time on, as against all persons.'

¹ Richardson v. Seybold, 76 Ind. 58.

² Lane v. Lutz, 3 Abb. App. Dec. 19.

³ Currie v. Knight, 34 N. J. Eq. 485.

⁴ McFadden v. Hopkins, 81 Ind. 459; Krutsinger v. Brown, 72 Ind. 466.

⁵ Corbin v. Kincaid, 33 Kans. 649; Chadbourn v. Rahilly, 28 Minn. 394.

246. Priority as between unrecorded mortgages is generally determined by priority of execution. In New York and some other states, where the rule prevails that a precedent debt does not constitute the mortgagee a purchaser in good faith, in a conflict between a prior mortgage made for such a consideration and a subsequent mortgage made to secure a debt created at the same time, the latter would prevail. As between two unrecorded mortgages given to secure antecedent debts, preference is given to that which is first in time.¹

But under a statute which declares that a mortgage not recorded shall be absolutely void as against subsequent mortgagees in good faith, it is held that a second mortgage taken in good faith and for value, although not recorded at all, takes priority over a first mortgage not recorded.² "The clear direction of the act is that a prior mortgage, unregistered, shall be 'absolutely void as against' subsequent mortgagees in good faith. We are asked to say that this result shall not follow unless such subsequent mortgagee shall obtain a priority in the registration of his mortgage. But we cannot say this, because the statute says just the reverse. The statute prescribes but a single condition to give a second mortgage priority over a first unregistered mortgage, namely, *bona fides* in the party taking it; it is not, therefore, in the competence of the court to require the performance of a second condition, namely, that such second instrument must be put first upon the record."³

As between two mortgages made by the same person on the same property, and filed the same minute, priority is determined by the intention of the parties, if there be any indication of such intention. If it appear that one was executed before the other, and that this was intended by the parties to constitute the prior lien, priority will be given to it.⁴

Priority as between mortgages of the same property recorded at different times is determined by the priority of record.⁵ If the mortgages be of crops to be grown, it is immaterial, as affecting this rule of priority, that the second mortgage was given for the

¹ *Tiffany v. Warren*, 37 Barb. (N. Y.) 571; *S. C.* 24 How. Pr. 293.

² *Bank v. Ellis*, 30 Minn. 270; *Coster v. Bank*, 24 Ala. 37, 63; *De Courcey v. Collins*, 21 N. J. Eq. 357.

³ *De Courcey v. Collins*, *supra*.

⁴ *Wray v. Fedderke*, 43 N. Y. Superior Ct. 335.

⁵ *Capital City Bank v. Hodgin*, 24 Fed. Rep. 1.

purchase price of the seed from which the crops were to be grown.¹ If it be agreed between the parties to two contemporaneous mortgages that one shall be a prior lien and shall be first filed for record, that mortgage is entitled to priority, although by mistake or inadvertence the other mortgage be filed first.²

247. Who are protected by record. — Statutes making unrecorded mortgages void against subsequent purchasers and mortgagees in good faith are intended to protect those only who have acquired rights of which they would be defrauded except for such protection.³ A purchaser who has paid nothing does not come within this protection, and no one can be protected as a *bona fide* purchaser except to the extent of his payments made before notice.⁴

The statutes do not protect wrong-doers, or those who acquire title by fraud or trespass.⁵ They can be invoked only by creditors and purchasers in good faith.

A mortgage for purchase money of chattels sold to the mortgagor by the mortgagee, — the sale and the mortgage being one transaction, — takes precedence of a mortgage of the same property made by the mortgagor to another person and recorded before the mortgagor acquired the property.⁶

Although the record is notice to a purchaser of the property, it is not notice to one who receives the proceeds of a sale of the property of the mortgagor, and applies the same to the payment of an antecedent indebtedness.⁷ “It would greatly embarrass commercial transactions if a party could not safely receive the proceeds of personal property without first examining the records of the one hundred counties in the state to see whether any mortgage upon the property is recorded. The party receiving the proceeds of such property has a right to presume that the sale was proper, or, if not, that the party entitled to the lien will pursue the property itself, and not its proceeds. If the fact of the existence of a mortgage was known, and the identical proceeds could be traced, a different question might arise.”⁸

¹ Bradley v. Gelkinson, 57 Iowa, 300.

² Chadbourn v. Rahilly, 28 Minn. 394.

³ Overstreet v. Manning (Tex.), 4 S. W. Rep. 248, 251.

⁴ Kohl v. Lynn, 34 Mich. 360.

⁵ Pratt v. Harlow, 16 Gray (Mass.),

379; Moses v. Walker, 2 Hilt. (N. Y.)

536; Johnson v. Jeffries, 30 Mo. 423.

⁶ Walker v. Vaughn, 33 Conn. 577.

⁷ Burnett v. Gustafson, 54 Iowa, 86; S. C. 6 N. W. Rep. 132.

⁸ Burnett v. Gustafson, 54 Iowa, 86, per Day, J.

II. *The Requisites of a Valid Record or Filing.*

248. Acknowledgment. — Statutes which prescribe the manner in which mortgages shall be executed and recorded must, in general, be strictly complied with. A record without an acknowledgment where this is required, or without an affidavit where that is required, is ineffectual; and it is equally ineffectual if there be any material defect in the certificate of acknowledgment, or of the taking of the oath, such as the omission of the officer before whom it was taken to sign the certificate.¹ A mortgage not executed or acknowledged in conformity with the statute, although spread upon the record, is not notice to creditors or purchasers.²

A mortgage recorded before the passage of an act relating to the recording of such an instrument, and recorded in accordance with such act, is notice under the statute.³

A false certificate of acknowledgment invalidates the mortgage, so that the property is liable to levy and sale on execution against the mortgagor.⁴

The record of a mortgage imperfectly acknowledged imparts no notice, and accordingly a purchaser of the mortgaged property from the mortgagor will hold it against the mortgagee under such a mortgage, although the mortgage be copied upon the recorder's books and indexed as a mortgage in the usual index.⁵ Whether actual knowledge of the record on the part of the purchaser, or even his knowledge of the existence of such a mortgage in any other way, would make the mortgage valid as against him, would depend upon the form of the statute; for while the statutes of some states make an unrecorded mortgage void only as to creditors and purchasers without notice, those of other states make them void as against all persons except the parties thereto.⁶

A mortgage recorded without the acknowledgment being entered upon the justice's docket, where this formality is required by statute, is not notice to purchasers and creditors of the mortgagor.⁷ If a statute require an acknowledgment before a justice

¹ *Hill v. Gilman*, 39 N. H. 88; *Becker v. Anderson*, 11 Neb. 493.

² *Frank v. Miner*, 50 Ill. 444.

³ *Fowler v. Merrill*, 11 How. 375.

⁴ *McDowell v. Stewart*, 83 Ill. 538.

⁵ *Selging v. Hebel*, 1 Mo. App. 340.

⁶ See §§ 308 *et seq.*

⁷ *Koplin v. Anderson*, 88 Ill. 120; *Frank v. Miner*, *supra*; *Porter v. Dement*, 35 Ill. 478.

of the peace in the precinct in which the mortgagor resides, and there be no justice in the precinct, or none capable of acting, the parties are left to their common law rights, and the mortgage can be made valid as against third persons only by a change of possession of the property.¹ Under such a statute, moreover, a non-resident cannot execute a mortgage so that the record of it will be constructive notice of it; and a foreign corporation does not become a resident so that it can make a valid execution of a mortgage, although it comply with the laws in pursuance of which foreign corporations are allowed to do business.²

Whether a mortgage has been duly acknowledged and recorded is a question for the court.³

249. An acknowledgment before a justice of the peace who is one of the mortgagees is void as to other mortgage creditors, it being against the policy of the law that any officer should perform either a ministerial or judicial act in his own behalf.⁴ In like manner an affidavit probating a mortgage, taken before a notary public who is the attorney of the mortgagee, is not a legal affidavit, and a mortgage recorded on such probate is not legally recorded.⁵

250. Where record should be made. — The statutes providing for the recording of chattel mortgages generally require such record to be made in the town or city where the mortgagor resides at the time.⁶ In this way it often becomes material to fix the residence of the mortgagor in order to determine whether the mortgage has been duly recorded; and this fact may be determined by any competent evidence. The declarations of the mortgagor made at the time of executing the mortgage are competent for this purpose.⁷ A temporary absence from one's fixed domicile, on business or pleasure, with the intention of returning, and an actual return in accordance with such intention, does not work a change of domicile; and therefore a mortgage made during the

¹ Frank v. Miner, 50 Ill. 444.

² Cook v. Hager, 3 Colo. 683. See § 253.

³ Bailey v. Godfrey, 54 Ill. 507; Durfee v. Grinnell, 69 Ill. 371; Bullock v. Narrott, 49 Ill. 62; Flynn v. Hathaway, 65 Ill. 462.

⁴ Hammers v. Dole, 61 Ill. 307; Wilson

v. Traer, 20 Iowa, 231; Beaman v. Whitney, 20 Me. 413. See Darst v. Gale, 83 Ill. 136.

⁵ Nichols v. Hampton, 46 Ga. 253.

⁶ Griffith v. Morrison, 58 Tex. 46, 52.

⁷ Veazie v. Somerby, 5 Allen (Mass.),

period of such temporary absence should be recorded at the place of the mortgagor's fixed residence.¹

A chattel mortgage executed in Big Rapids in August, and recorded there the same month in the same year, was made by a resident of Grand Rapids, who left that place in July to make his home in Big Rapids. Before leaving, he gave instructions for the sale of his house, in which, however, his family continued to live until the last of August, when they joined him and remained with him until the following spring. He then moved back to Grand Rapids, his house there remaining unsold. It was held that the grantor's residence at the time the mortgage was filed was in Grand Rapids, and the mortgage not having been recorded there, as required by statute, was not notice to creditors.²

The recording of a mortgage in the wrong office, though done through mistake, is of no avail.³

251. It is the place of residence of the mortgagor at the time the mortgage is executed, and not his place of residence at the time it is recorded or filed, that determines the place where it should be recorded or filed.⁴ It does not aid in establishing the validity of a mortgage that the mortgagor, having bought a farm in a town other than that of his residence, together with the stock thereon, gave a mortgage upon the stock, and in a few days afterwards moved his residence to the farm, and the mortgage was filed in the town in which the farm was situated; the mortgage was void as against a *bonâ fide* purchaser.⁵ The requirement to file or record the mortgage in the place of residence of the mortgagor must be strictly followed; and the mortgagee cannot substitute for that the filing of the mortgage in any other place, although he may think that by so doing much better information of the existence of the mortgage will be afforded than would be afforded by a literal compliance with the statute.

A mortgage of goods contained in a branch store of the mortgagor, in a county other than that in which he resides, recorded in the county of his residence, carries title to the goods as against

¹ *Boyd v. Beck*, 29 Ala. 703.

⁴ *Hicks v. Williams*, 17 Barb. (N. Y.)

² *Cass v. Gunnison* (Mich.), 36 N. W. 523.

Rep. 45.

⁵ *Powers v. Freeman*, 2 Lans. (N. Y.)

³ *Wallen v. Rossman*, 45 Mich. 333.

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a mortgage thereof previously recorded in the county where the goods were.¹

If the statute simply requires the record to be made in the place of the mortgagor's residence, it does not matter that the property is situated in another town or county, and that it is never afterwards brought to the place of residence of the mortgagor, if his mortgage be recorded there.²

252. When some of the mortgagors are residents and others non-residents of the state, a statute requiring the mortgage to be recorded in the county where the mortgagor resides, if a resident of the state, and, if not a resident, then in the county where the property is situated, must be complied with by recording the mortgage in the counties in which such residents live, and also in the county where the chattels are situated.³ "In the present case," say the court, "one of the mortgagors resided in the county of Union, in New Jersey, and the other in New York. With regard to the former, the statutory requisition could be complied with only by a registry in the place of his residence; and as to the latter, a similar form was requisite in the county of the *situs* of the property. This is a remedial statute, its object being to discourage the placing of secret liens upon personal property, and this object is obviously promoted by requiring that these mortgages must be recorded at the places of the residence of all such of the mortgagors as reside in the state; and in the case of others being non-resident, that there then must be likewise a registration in the county in which the chattels are situate."

253. The place of residence of a corporation for the purpose of recording a mortgage by it is the place where it keeps its principal office.⁴ It would be most unreasonable to hold that a mortgage by a corporation or joint-stock association should be recorded or filed in each town within the state in which any one of its stockholders might reside.⁵

As a corporation can have no legal existence out of the boun-

¹ Weaver v. Chunn (N. C.), 6 S. E. Rep. 370.

² Singleton v. Young, 3 Dana (Ky.), 559; Vaughn v. Bell, 9 B. Mon. (Ky.) 447.

³ De Courcey v. Collins, 21 N. J. Eq. 357, affirming S. C. 19 Ib. 115.

⁴ Wright v. Bundy, 11 Ind. 398.

⁵ Nelson v. Neil, 15 Hun (N. Y.), 383.

daries of the sovereignty by which it is created, it follows that a foreign corporation has no residence unless its existence as an artificial person is acknowledged and recognized by statute, and it can make no effectual mortgage in a state whose laws provide that a mortgage, to be valid as against third parties, must be recorded in the county in which the mortgagor resides.¹

254. A mortgage filed in the proper office, as regards a portion of the property embraced in it, is not rendered inoperative as to such property by the fact that it was not filed in the proper office as to other chattels described in it.²

255. Under a statute requiring the record to be made in the county or town in which the property may be, a record in another county is ineffectual,³ and the subsequent removal of the property to such other county does not give it validity from that time; so that a subsequent mortgage made and recorded in such other county, after the removal of the property there, takes precedence.⁴

Personal property is situate where it is used day by day, or where it is stored when not in actual use, and where the business in which it is employed is done.⁵

256. The mortgagor's residence, as well as the fact of record, must be alleged and proved, when the validity of a mortgage depends upon its having been recorded in the place of residence of the mortgagor.⁶ A recital of the place of residence of the mortgagor in the deed is not sufficient; and although such a recital might estop the mortgagor to deny that he resided in the place so recited, it does not estop his other creditors to show that the recital is erroneous. The statute was enacted for the benefit of creditors, and it imposes a rigid and unbending condition as a condition to the validity of a mortgage, namely, that it be recorded or filed in the place where the mortgagor actually resides.⁷ In a recent case before the Supreme Court of the United States,

¹ *Watson v. Thompson Lumber Co.* (Ark.), 4 S. W. Rep. 62. See § 248.

² *Hubbardston Lumber Co. v. Covert*, 35 Mich. 254.

³ *Platt v. Stewart*, 13 Blatchf. 481.

⁴ *Lane v. Mason*, 5 Leigh (Va.), 520.

⁵ *Lathe v. Schoff*, 60 N. H. 34.

⁶ *Bither v. Buswell*, 51 Me. 601; *Smith v. Jenks*, 1 Den. (N. Y.) 580.

⁷ *Platt v. Stewart*, *supra*; *Chandler v. Bunn, Hill & D. Lalor's Supp.* (N. Y.)

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the holder of a mortgage not filed in the place of residence of the mortgagors, but filed in the city of New York, which was the place of business of their firm, laid some stress upon the fact that the mortgagors described themselves in the mortgage as of the city of New York. To this the court, speaking through Mr. Justice Harlan, reply: ¹ "If that is to be regarded as a representation by them that their fixed abode was in that city, it is obvious that the statute designed for the protection of creditors, subsequent purchasers, and mortgagees in good faith, cannot be thus defeated. Their rights depend not upon recitals or representations of the mortgagors as to their residence, but upon the fact of such residence. The actual residence controls the place of filing; otherwise the object of the statute would be frustrated by the mere act of the parties, to the injury of those whose rights were intended to be protected."

257. A mortgage made by joint mortgagors as partners residing in different towns must be recorded in each of the towns in which the mortgagors reside.² It does not follow that because the actual possession of the property is in one of several owners, and his possession is in effect the possession of all, the registry of the mortgage in the town where he resides is sufficient. The statute requires the record to be made in the town "where the mortgagor resides." But the word "mortgagor" must be regarded as including "mortgagors." No other construction of the statute would effectually secure the giving of the notice intended by the statute, or would remedy the evils it was intended to prevent.³

Where the members of a firm have their actual and permanent residence in one place, but transact their business in another, where they board for a part of the year, but with no intention of changing their domicile, a chattel mortgage given by them should

¹ *Stewart v. Platt*, 101 U. S. 731, 737. Nelson, C. J., is quoted as saying in *Chandler v. Bunn*, *supra*, that the recital of the residence in the mortgage "seems to be of no importance, and might, for the matter of security, be omitted altogether." In *Stewart v. Platt*, *supra*, JJ. Field, Swayne, and Bradley dissented, on the ground that the domicile of the firm is the place where

it is located and carries on its business, and that a record there is sufficient.

² *Stewart v. Platt*, 101 U. S. 731; *Rich v. Roberts*, 48 Me. 548; *S. C.* 50 Me. 395; *Morrill v. Sanford*, 49 Me. 566; *Aultman v. Guy*, 41 Ohio St. 598; *Granger v. Adams*, 90 Ind. 87; *De Courcey v. Collins*, 21 N. J. Eq. 357.

³ *Morrill v. Sanford*, *supra*.

be filed at their permanent place of residence. To hold that they resided somewhere else, merely because they happened to own a mill in another place, would be a perversion of the plain language of the statute, which makes their actual residence the proper place to file chattel mortgages.¹

258. The most important decision upon this point is that by the Supreme Court of the United States in *Stewart v. Platt*.² In that case the mortgagors, who resided in Westchester County, and were lessees of a hotel in the city of New York, made a mortgage of the furniture of the hotel, and this was duly filed in the office of the register of deeds for the city and county of New York, but was not filed in the towns where the mortgagors respectively resided with their families, as provided by the statute of New York. It was held that there was no effectual filing of the mortgage. Mr. Justice Harlan, delivering the opinion of the court, said: "The contention of learned counsel for the appellants is that *the firm* was the mortgagor, that its residence or domicile was in the city of New York, and that the manifest object of the statute was met by filing the several mortgages in the city where the firm carried on its business. The question thus presented is within a very narrow compass, and is not free from difficulty. Its solution depends upon the meaning of the word 'reside,' employed in the statute. It is to be regretted that we are not guided by some direct controlling adjudication in the courts of New York construing the statute under examination. But no such decision has been brought to our attention. With some hesitation we have reached the conclusion that a chattel mortgage, executed by a firm upon firm property, is void, under the New York statute, as against creditors, subsequent purchasers, and mortgagees in good faith, unless filed in the city or town where the individual

¹ *Briggs v. Leitelt*, 41 Mich. 79.

² 101 U. S. 731. The learned justice further said: "A good deal was said in oral argument as to the serious inconveniences which may result from any construction of the statute that requires chattel mortgages executed by a firm upon its property to be filed elsewhere than in the town or city where the property is used, and where the firm business is conducted.

On the other hand, it is quite easy to suggest reasons of a cogent character why, in view of the manifest purpose of such legislation, the actual residence of the mortgagors should determine the place of filing. But these are considerations to be addressed more properly to the legislature of New York, with whom rests the power to make such alterations as experience may suggest to be necessary."

members of the firm severally reside. The statute upon its face furnishes persuasive evidence that its framers intended to make a sharp distinction between the place where the property might be at the time of the execution of the mortgage and the place of the mortgagor's residence. If he be a non-resident of the State of New York, the mortgage may be filed in the town or city where the property shall be at the time of the execution of the mortgage. If he be a resident, then his residence, not the actual *situs* of the property, governs. If these instruments be executed by several resident mortgagors, the statute would seem to require that the mortgage be filed in the towns or cities where the mortgagors at the time respectively reside."

259. In case the individual members of a partnership are not residents of the state, a partnership having a definite place of business may be regarded as residing there for the purpose of determining the proper place for filing a mortgage by the firm made in the firm name strictly for the use of the firm; and accordingly it has been held that a mortgage of a copartnership executed in its name, and not in the name of the individuals composing it, by the resident partner, the other partner residing in another state, was properly filed in the clerk's office of the town in which he resided, and in which the partnership had its usual place of business.¹

260. The removal of a mortgagor from the town or county in which he resided when the mortgage was executed, and where it was duly recorded, and the taking of the mortgaged property with him, does not invalidate the record of the mortgage, or necessitate the recording of it again in the town or county to which he has removed.² The object in requiring a record of the mortgage is to give publicity to it, and to provide a source of information common to all persons, so that they may determine, with some degree

¹ *Hubbardston Lumber Co. v. Covert*, 35 Mich. 254. This decision would not apply to a case where both partners resided in the state.

² § 299; *Brigham v. Weaver*, 6 Cush. (Mass.) 298; *Whitney v. Heywood*, 1b. 82; *Barrows v. Turner*, 50 Me. 127; *Hoit v. Remick*, 11 N. H. 285; *Offut v. Flagg*,

10 N. H. 46; *Hicks v. Williams*, 17 Barb. (N. Y.) 523; *Pease v. Odenkirchen*, 42 Conn. 415; *Elson v. Barrier*, 56 Miss. 394; *Cool v. Roche*, 20 Neb. 550; 31 N. W. Rep. 367; *Wilkinson v. King*, 81 Ala. 156; *Griffith v. Morrison*, 58 Tex. 46; *Keenan v. Stimson*, 32 Minn. 377.

of facility, convenience, and certainty, the question of title to the property, whenever they may be interested to know it; while at the same time it is not among the purposes of the recording acts to subject a *bond fide* mortgagee to the inconvenience of the constant vigilance and ceaseless watching which would be requisite to guard and secure his interests, if he were obliged to record his mortgage in every town into which the mortgagor might see fit to remove with the property. If he were required to do this, his security would be wellnigh worthless; for before he could do this, a creditor of the mortgagor might seize the property by process of law, or the mortgagor himself might pass the title to it by way of sale to an innocent purchaser.¹

In like manner, if the mortgage be required to be recorded in the county of the mortgagor's residence, his removal with the property to another county does not necessitate the recording of the mortgage again in the county to which he removes.²

Under such a statute, a mortgage executed in the county of the mortgagor's residence, upon a crop to be planted on land bought by him in another county, to which he contemplated removing at the time of the execution of the mortgage, and to which he actually removed, may properly be recorded in the latter county.³

The same rule also applies when the mortgagor removes with the property to another state.⁴ A creditor of the mortgagor attaching the property, or a purchaser of it, must look to the title. Possession is merely *prima facie* evidence of it. If the holder of the property has recently come from an adjoining state, there may be a mortgage upon the property in that state; and a purchaser or creditor must exercise his diligence by inquiring there whether the property is incumbered, just as, when the owner has recently removed from another part of the same state, the purchaser or creditor is bound to inquire at such former residence of the owner for incumbrances there recorded.

¹ *Hoit v. Remick*, 11 N. H. 285, per Woods, J. Quoted with approval in *Griffith v. Morrison*, 58 Tex. 46.

² *Bevans v. Bolton*, 31 Mo. 437; *Feurt v. Rowell*, 62 Mo. 524.

³ *Harris v. Jones*, 83 N. C. 317; *Simpson v. Morris*, 3 Jones (N. C.), 411.

⁴ *Offut v. Flagg*, 10 N. H. 46; *Smith v. McLean*, 24 Iowa, 322; *Feurt v. Rowell*, *supra*; *Kanaga v. Taylor*, 7 Ohio St. 134; *Cool v. Roche*, 20 Neb. 550; 31 N. W. Rep. 367; *Lathe v. Schoff*, 60 N. H. 34. See §§ 299, 303.

§§ 261, 262.] RECORDING, FILING, AND REFILING.

261. In case the mortgagor resides out of the state, under a statute which provides for the recording of a mortgage at the mortgagor's place of residence, and does not provide for recording it in the place where the mortgaged property is situated, there can be no effectual record of the mortgage; and therefore the only effectual mode of making the mortgage is for the mortgagee to take and hold actual possession of the property.¹ The statute does not provide for such a case.

Under a statute which provides that the mortgage shall be recorded in the county or town in which the mortgagor resides, but if he is not a resident of the state, then in the county or town where the property may be at the time the mortgage is executed, if there be several mortgagors and some of them reside in and others out of the state, the mortgage must be recorded in the counties or towns in which such residents live, and also in the county or town in which the chattels are situated.²

262. Under a statute which makes void as against others than the parties a mortgage not recorded within a specified time after execution, it is incumbent upon the mortgagee, when asserting any rights under the mortgage, to show that it was recorded within the time limited.³ The record is not constructive notice for any purpose unless it be made within the time limited.⁴ Although the want of record within the proper time cannot be cured by a subsequent record, the mortgage may be made effectual by the mortgagee's taking possession before others have acquired rights in the property.⁵ But under a statute which merely provides that a mortgage must be recorded within a specified time, or be postponed to other liens created or obtained, and to purchases made prior to the actual record of the mortgage, the mortgagee's only risk in not recording the mortgage within the time specified is the risk of having his mortgage lien postponed or destroyed by the recording of other liens, or the obtaining of

¹ §§ 253, 288, 303, 304; *Smith v. Moore*, 11 N. H. 55.

² *De Courcey v. Collins*, 21 N. J. Eq. 357.

³ *Chenyworth v. Daily*, 7 Ind. 284. Under a statute requiring a mortgage to be recorded within sixty days after its execu-

tion, a record made on the sixtieth day after its execution is in due time. *Miller v. Henshaw*, 4 Dana (Ky.), 325.

⁴ *Sidener v. Bible*, 43 Ind. 230; *McCord v. Cooper*, 30 Ind. 9; *Lockwood v. Slevin*, 26 Ind. 124.

⁵ *McTaggart v. Rose*, 14 Ind. 230.

judgments while his mortgage remains unrecorded.¹ Under a statute declaring a mortgage, not recorded within a certain time, invalid against other persons than the parties thereto, a mortgage not so recorded is good between the parties ;² but it has been held that failure to record the mortgage renders it void as to all persons other than the parties thereto, whether such persons had or had not acquired a lien upon the property ; and that, therefore, although a mortgagee acquire possession of the property after that time and before a creditor obtains any lien upon it, it is of no validity against such general creditor. The statute is regarded as applying not merely to controversies relating to the priority of liens, but as absolutely requiring the record to be made within a fixed time as against all others than the parties to it.³

263. A mortgage does not become a valid lien against creditors of the mortgagor until it is recorded. That the mortgage is given for the purchase money of the mortgaged property does not relieve the mortgagee from the necessity of recording it before other liens attach. Thus, if there be an execution in the hands of a sheriff at the time of the debtor's purchase of the property, so that the lien of the execution would attach to the property upon the delivery of it to the debtor, and he gives a chattel mortgage for the purchase money at the time of the purchase, but the mortgagee neglects for twenty hours to record it, the execution becomes a prior lien.⁴

264. If the recording officer be required to minute the time when the instrument is received, both in the book of records and on the mortgage itself, it is not recorded until he has made both of these minutes.⁵ But the recording of the mortgage supersedes the necessity of noting in the book of records the time when it was received.⁶

Such noting does not show the date of the record except by inference, and this inference may be overcome by evidence contradicting it. It is not an entry of the date of the record, but

¹ *Hardaway v. Semmes*, 24 Ga. 305 ; *v. Sprowl*, 31 Me. 73 ; *Head v. Goodwin*, 37 Me. 181 ; *Jones v. Parker*, 73 Me. 248.

² *McTaggart v. Rose*, 14 Ind. 230.

See §§ 270, 274.

³ *Sidener v. Bible*, 43 Ind. 230.

⁶ *Head v. Goodwin*, *supra* ; *McLarren*

⁴ *Self v. Sanford*, 4 Bradw. (Ill.) 328.

v. Thompson, 40 Me. 284.

⁵ *Handley v. Howe*, 22 Me. 560 ; *Holmes*

only of the time when the mortgage is received, that is required.¹ The validity of the record is not impaired by the officer's spreading the instrument upon record in the wrong book.²

But whether a statute requiring the recording officer to enter in a book certain facts touching a mortgage makes such minutes an essential part of the record, so that a failure to make them will invalidate a mortgage otherwise duly filed, or whether it be directory only, must depend much upon the terms of the statute.³

But aside from a requirement that the time of receiving instruments for record shall be minuted, or the like, the deposit of a mortgage in the proper office to be filed or recorded is equivalent to recording it.⁴

265. Who may receive a mortgage for record. — If a vacancy occur in the office of recorder, a person in charge of the office may receive and file a mortgage, and such filing is valid.⁵ A clerk in the store of the town clerk and in charge of the town clerk's office may, in the absence of that officer, receive and file a mortgage.⁶

266. What is a sufficient delivery for record. — The mere leaving of a mortgage with a recording officer, to record it at a future time, is not equivalent to a record. Thus, where a mortgagor intrusted with the recording of a mortgage requested the officer to "keep it out of sight for a few days," it was held that this was equivalent to a direction not to record it until further orders, and that there could be no record until further orders were given.⁷ And so where a mortgagor delivered a mortgage to the town clerk, and upon some question arising about the recording fee the mortgagor said, "Then you may let it lie as it is, and when I want you to record it I will let you know," it was held that it could not be deemed to be recorded until such notice should be given; and that, although the clerk on receiving the

¹ Jones v. Parker, 73 Me. 248.

² Head v. Goodwin, 37 Me. 181.

³ A statute of this nature in Wisconsin was held to be directory only. Smith v. Waggoner, 50 Wis. 155; S. C. 9 Am. Law Rec. 358.

⁴ § 271; Heflin v. Slay, 78 Ala. 180; Dubose v. Young, 10 Ala. 365; Meherin

v. Oaks, 67 Cal. 57; Parker v. Palmer, 13 R. I. 359; Cass v. Rothman, 42 Ohio St. 380.

⁵ Bishop v. Cook, 13 Barb. (N. Y.) 326.

⁶ Dodge v. Potter, 18 Barb. (N. Y.) 193; Bishop v. Cook, *supra*.

⁷ Low v. Pettengill, 12 N. H. 337.

mortgage minuted the day and hour of its reception upon the instrument, there was no valid record of it until it was at a subsequent time ordered to be recorded.¹

A delivery of a mortgage to the recorder when absent from his office after business hours is not effectual until it is taken to the office and there filed, although he mark it as filed when received.²

The filing of a mortgage with the recorder by the mortgagor, to be recorded when he should receive the fee therefor, followed by a record of it, is a sufficient delivery of it. The presumption is that he received the fee.³

If a mortgagor request the recorder to file a mortgage for record, but to return it to him without recording it, stating that there is some trouble about the property, and that he may wish to make some changes in the deed, he may well be regarded as acting as the agent of the mortgagee in the transaction, in the absence of proof that the latter repudiated the transaction; and a jury is warranted in finding that the mortgagor was acting for the mortgagee, and was expected to place the deed on record when he might consider it desirable or necessary.⁴

267. The mortgagee may make the mortgagor his agent to file or record a mortgage; and the fact that it was made and recorded or filed without the mortgagee's knowledge does not render it invalid, if this was done by his direction or request.⁵ If a mortgagor at the request of his mortgagee file a mortgage in the proper office, but afterwards, for his own purposes and without the mortgagee's knowledge, request the clerk to hide it at the bottom of the pile, so that it may not readily be seen, such request, not being within the scope of his agency for the mortgagee, cannot prejudice his rights.⁶

268. A mortgage cannot be withdrawn from the files where filing instead of recording is prescribed, without endangering the effect of the filing as notice at least during the time the mortgage is withdrawn, although the proper entry appear upon the index.⁷

¹ *Town v. Griffith*, 17 N. H. 165. See, also, *Parker v. Palmer*, 13 R. I. 359.

² *Hathaway v. Howell*, 54 N. Y. 97.

³ *Connard v. Colgan*, 55 Iowa, 538.

⁴ *Haenschen v. Luchtemeyer*, 49 Mo. 51.

⁵ *Harrington v. Britton*, 23 Wis. 541; *Sargeant v. Solberg*, 22 Wis. 132. See § 105.

⁶ *Case v. Jewett*, 13 Wis. 498.

⁷ *Sternberger v. McSween*, 14 S. C. 36.

But if it be returned to the files, one purchasing afterwards is affected with notice, although the recording officer upon its withdrawal had made an entry upon the file book that the mortgage had been delivered up to the mortgagee, and this entry remained standing after the return of the instrument. Thus a purchaser inquiring at the clerk's office in regard to the property was informed by the clerk that the mortgage upon it had been withdrawn, and the memorandum to this effect was shown him. It turned out that the clerk was mistaken, and that the mortgage had been returned, and was then on file. In a suit between the purchaser and mortgagee, it was held that the mortgagee's title must prevail; that his rights were secure so long as the mortgage was actually on file. The clerk's entry was unofficial, and both this and his statement to the purchaser were unauthorized. The clerk had no right to deliver the instrument to the mortgagee to be taken away, but having done so and afterwards allowed it to be returned, no second indorsement of the filing is necessary to make it notice under the statute thereafter.¹

If a mortgage which is required to be recorded be withdrawn by the mortgagee from the recorder's office before it is spread upon the record, though after the receipt of the instrument has been noted thereon, the record is incomplete and of no avail.² If the instrument be withdrawn and afterwards returned for record, or if it be left with the recorder with directions not to record it, and afterwards the mortgagee directs the recording of it, the date of the reception of the instrument for record is that of the subsequent return of it or of the subsequent direction to record it.³

269. If a mortgage be withdrawn from the files wrongfully and without the mortgagee's authority, his lien is not affected. Such is the case if the withdrawal be made by one while acting as the agent of the mortgagee, but not acting within the scope of his authority in making the withdrawal. Thus, a mortgagee having sent his son to the clerk's office to see if the mortgage was on file, the son misunderstood his instructions, and withdrew the mort-

¹ *Woodruff v. Phillips*, 10 Mich. 500. It was observed by the court, that if the purchaser had called to see the mortgage while it was out of the office, or if the mortgagee had given his assent to the memorandum, a different question would

have arisen, upon which the court expressed no opinion.

² *Jones v. Parker*, 73 Me. 248; *Bowen v. Fassett*, 37 Ark. 507.

³ *Jones v. Parker*, *supra*; *Bowen v. Fassett*, *supra*.

gage and took it to his father, who with due diligence caused it to be refilled. While the mortgage was absent from the files, the property was attached by a creditor of the mortgagor, with knowledge of the facts. It was held that the mortgagee's lien was good as against the attachment. The agent in taking the mortgage from the office committed a wrong, as much as if his business at the office had no connection whatever with the mortgage. It was an unauthorized act for which the mortgagee should not suffer, especially when the opposing claimant had full knowledge of the lien he sought to subvert.¹

270. Notice by record is effectual from the time that the instrument is left for record in the proper office. It is not essential, to give effect to the record, that the instrument be actually spread upon the record.² The time when the mortgage is received is generally required to be noted upon the instrument and in a book kept for the purpose. The instrument is considered as recorded when it is left with the recording officer and so noted as received. The subsequent recording relates back to the time of the noting. If, however, the noting be omitted, and the mortgage recorded without it, the record takes effect from the time when it is actually extended upon the record.³ If a mortgage be left for record and indorsed in the usual manner by the recording officer, the record is valid from that time as against a subsequent attaching creditor, although just previous to the attachment an examination of the records was made and no mortgage of the property was found, and the recording officer stated there was no mortgage of it upon record, but the mortgage was afterwards found by such officer in his private drawer.⁴

A mortgage is protected from the time it is recorded, although

¹ *Swift v. Hall*, 23 Wis. 532. The court observe that if the attaching creditor had been ignorant of the transaction, and of the manner in which the mortgage was withdrawn from the office, and had called at the office and learned that it was not on file, and then had attached the property, a different question would have arisen, upon which no opinion was expressed. See, also, *Woodruff v. Phillips*, 10 Mich. 500.

² *Craig v. Dimock*, 47 Ill. 308; *M'Gregor v. Hall*, 3 St. & P. (Ala.), 397; *Miller v.*

Whitson, 40 Mo. 97; *Parker v. Palmer*, 13 R. I. 359. See §§ 264, 274.

³ *McLarren v. Thompson*, 40 Me. 284; *Head v. Goodwin*, 37 Me. 181; *Holmes v. Sprowl*, 31 Me. 73. Under a statute in Maine a noting both upon the mortgage and in the book was requisite to make the record effectual from the time the instrument was left. *Handley v. Howe*, 22 Me. 560.

⁴ *Jordan v. Farnsworth*, 15 Gray (Mass.), 517.

a statute declares that unless deposited for record "forthwith" it shall be void. Though there be delay in recording the mortgage, it is valid between the parties, and it becomes valid against all except those who have previously acquired rights in the property.¹

A mortgage is not, however, effectually recorded, though it be left for record and proper entries of its receipt be made upon the mortgage and in a book kept for the purpose, if the instrument be withdrawn by the mortgagee or by his order before it is actually recorded. A statutory provision, that a mortgage "shall be considered as recorded when received," must be construed to mean that a delivery and entry of the mortgage for record shall have the same effect as the spreading of the instrument upon the records, if subsequently in due course it be actually spread upon the records. The mortgage must be left with the recorder until he has actually recorded it. Otherwise the requirement of a record might be disregarded, and the purpose of the law, which is to give notice, not only of the existence of the mortgage, but also of its contents, would be defeated.²

271. A mortgage is filed, within the meaning of the statutes relating to filing, when it is delivered to the proper officer for the purpose of notice.³ Statutory provisions requiring the officer to indorse upon the instrument the time of its reception and the number thereof, and to enter in a suitable book the names of the parties, the date of the instrument, the amount secured, and the time when the debt becomes due, do not make these acts a part of the filing, or prerequisites thereto. "File" means, at common law, "a thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed, for the more safe keeping and ready turning to the same."⁴ "Within this definition, a paper might be said to be filed when strung upon the thread, string, or wire. That particular mode of filing having almost entirely gone out of use, another mode of filing, the purpose of which is the same, has taken its place; so that, as Bouvier

¹ *Wilson v. Leslie*, 20 Ohio, 161.

² *Jones v. Parker*, 73 Me. 248.

³ § 264; *Gorham v. Summers*, 25 Minn. 81, 87; *Case v. Hargadine*, 43 Ark. 144, 148; *Parker v. Palmer*, 13 R. I. 359; *Cass v. Rothman*, 42 Ohio St. 380.

⁴ *Wharton's Law Lexicon*; *Bouvier's Law Dictionary* : —

"Dan Chaucer, well of English undefyled,
On Fame's eternal bead-roll worthy to be fylde."
SPENSER'S *Faerie Queene*.

says, 'A paper is also said to be filed when it is delivered to the proper officer, and by him received to be kept on file.' This, which we take to be the present ordinary sense of the word 'filed,' would be presumed to be the legislative sense, unless the contrary is made to appear."¹

272. Any neglect of duty by the recording officer need not concern the mortgagee after he has left for record or filed his mortgage. Thus, where a mortgage was duly filed with the town clerk, who was the mortgagor, and he received and indorsed it without receiving or demanding his statutory fees, his neglect to enter it upon the index, or to place the instrument in the files of mortgages, was held not to invalidate the mortgage; the remission of the fees or the giving credit therefor concerns no one but the officer, and the mortgagee, having done all the statute required of him, cannot be prejudiced by the failure of the officer to do his duty.² "The statute seems to have required the deposit, not merely for notice to creditors and purchasers, but chiefly to show the transaction to have been actual and genuine, and to prevent secrecy and imposition, and to remove the presumption otherwise arising against good faith. It was to permit such mortgages to be given by men in business without requiring them to suspend their business, or give up possession of their stock in trade, on which they rely to raise the amount of their debts."³

The index is no part of the record unless expressly made so by statute, and therefore the record of a mortgage is not invalidated by the failure of the recording officer to index it.⁴

273. A mistake in spreading a mortgage upon the record may invalidate it as notice; although a mistake which would be material in one instance might be immaterial in another.⁵ Ordinarily a mistake in recording the date of the mortgage, such as recording the date as of an earlier year or earlier month, would

¹ *Gorham v. Summers*, 25 Minn. 81, 87, per Berry, J.

² *People v. Bristol*, 35 Mich. 28; *Dikeman v. Puckhafer*, 1 Abb. (N. Y.) Pr. N. S. 32; *Dodge v. Potter*, 18 Barb. (N. Y.) 193; *Neele v. Berryhill*, 4 How. (N. Y.) Pr. 16; *Turner v. McFee*, 61 Ala. 468.

³ *People v. Bristol*, *supra*, per Campbell, J.

⁴ *Chase v. Bennett*, 58 N. H. 428; *Nicklin v. Betts Spring Co.* 11 Oreg. 406, 411, per Lord, J.; *Jordan v. Hamilton Co. Bank*, 11 Neb. 499; 1 *Jones on Mortgages*, § 553.

⁵ 1 *Jones on Mortgages*, §§ 550, 551.

not, perhaps, invalidate the record. But where a mortgage was made of ship-building materials, and the mortgagee afterwards claimed a vessel under the mortgage as built of such materials, a mistake in recording the date of the mortgage as made six months earlier than the actual date of it was held to render the record of the mortgage ineffectual as against attaching creditors of the mortgagor.¹

An error of the register in indexing a mortgage does not invalidate the record, although a subsequent purchaser is thereby misled.²

274. A certificate of the recording officer is conclusive evidence that a mortgage has been recorded.³ It does not matter upon what part of the paper the certificate be written. It is conclusive that a memorandum written below the certificate of record, and referring by asterisks to the mortgage, was recorded; and the record itself is not admissible to contradict the certificate.⁴ The recording officer may write his certificate upon such part of the paper as is most convenient for him without varying its interpretation. If it purports to be a certificate that the whole mortgage was recorded, it must be so construed.⁵

A mortgage must be produced and proved by common law evidence, or its non-production accounted for, so as to authorize secondary evidence. A certificate of the town clerk, in whose office a chattel mortgage is filed, stating that a paper is a copy of the original mortgage, is no proof of the existence of the mortgage; neither is it any proof that the paper purporting to be a copy of the mortgage is a copy.⁶

III. *What Instruments are within the Recording Acts.*

275. A bill of sale absolute upon its face, but executed as a security and intended to operate as a mortgage, is within the operation of a statute making void a mortgage not recorded, in case the property be not delivered to and retained by the mort-

¹ Stedman v. Perkins, 42 Me. 130.

² Dikeman v. Puckhafer, 1 Daly (N. Y.), 489; S. C. 1 Abb. (N. Y.) Pr. N. S. 32.

³ Fuller v. Cunningham, 105 Mass. 442; Thayer v. Stark, 6 Cush. (Mass.) 11; Jordan v. Farnsworth, 15 Gray (Mass.),

517; Ferguson v. Clifford, 37 N. H. 86; Head v. Goodwin, 27 Me. 181. See Smith v. Waggoner, 50 Wis. 155; S. C. 9 Am. L. Rec. 358. See §§ 264, 270.

⁴ Adams v. Pratt, 109 Mass. 59.

⁵ Adams v. Pratt, *supra*.

⁶ Bissell v. Pearce, 28 N. Y. 252.

gagee.¹ Although the condition be not expressed, if the intention of the parties that the instrument shall operate as a mortgage be declared or conceded, the instrument, however imperfect it may be in form, is within the purview of the statute requiring such mortgages to be recorded.²

A subsequent writing authorizing a sale of the property, upon breach of the condition, need not be filed in order to make the filing of the bill of sale valid.³

276. An instrument evidencing a conditional sale need not be recorded as a chattel mortgage in order to be valid against creditors or subsequent purchasers.⁴ Judge Dillon, upon the advisability of a statute embracing such an instrument, said: "It may be that the registry laws, if wisely framed, ought to extend to such a case as this, and to require the seller to place the evidence of his rights on record; and accordingly we find that some of the states have recently passed enactments of the character suggested. But there is no such legislative requirement in Missouri. This instrument was not a mortgage or deed of trust within the statute above quoted."

277. The recording of a bill of parcels of chattels taken as security for a debt without any delivery of them does not make it a mortgage, nor answer the requirements of statute that a mortgage, to be valid except as between the parties, shall be recorded, or the property be delivered to and retained by the mortgagee;

¹ Nicklin v. Betts Spring Co. 11 Oreg. 406; Preston v. Southwick, 42 Hun (N. Y.), 291; Bird v. Wilkinson, 4 Leigh (Va.), 266; Kuhn v. Graves, 9 Iowa, 303; Dukes v. Jones, 6 Jones (N. C.) L. 14. In this case it was declared, however, that a bill of sale intended to operate as a mortgage, which does not set out on its face the true nature of the transaction, is not susceptible of registration. And see Sanders v. Pepoon, 4 Fla. 465.

² Shaw v. Wilshire, 65 Me. 485; overruling Knight v. Nichols, 34 Me. 208. Now by statute in Maine. R. S. ch. 111, § 5. A contract in a sale of chattels that the property shall remain the property of

the vendor until the price is paid, or reserving a lien for the purchase money, where a note for this is given, is void, unless it is made and signed as part of the note, and unless recorded like a mortgage of personal property, provided such note exceeds thirty dollars. And see Cooper v. Brock, 41 Mich. 488; S. C. 2 N. W. Rep. 660.

³ Preston v. Southwick, *supra*.

⁴ Rogers Locomotive Works v. Lewis, 4 Dill. 158; Fosdick v. Shall, 99 U. S. 235; Myer v. Car Co. 102 U. S. 1; Nash v. Weaver, 23 Hun (N. Y.), 513. There are statutes requiring such record in Nebraska, § 216, and Wisconsin, § 234.

for an oral mortgage is in its nature such that it cannot be recorded under the statute.¹ Such a transaction at most amounts only to a pledge, which is ineffectual by reason of leaving the possession of the property with the general owner.²

A mere agreement about personal property, if not a mortgage, need not be recorded.³

277 a. The recording acts apply to mortgages of future property, such for instance as crops to be grown upon land in possession of the mortgagor. They apply to such mortgages, although the acts provide that the instruments shall be recorded or filed in the town where the mortgaged property is at the time of the execution of such mortgages, if the statutes were intended to apply to all chattel mortgages, though, of course, in a literal sense such future property cannot be said to be in any place. But such property may have a potential existence, and in contemplation of law may have a *situs*.⁴

278. Choses in action.—Statutes respecting the recording of mortgages of personal property apply only to goods and chattels capable of delivery, and not to defeasible or conditional assignments of choses in action. It is not necessary to the validity of such assignments that they be recorded.⁵ The capital stock of a corporation is not goods and chattels within the meaning of the act concerning chattel mortgages, and therefore a mortgage of such stock need not be filed or recorded,⁶ and the record of it is

¹ Williams v. Nichols, 121 Mass. 435.

² Walker v. Staples, 5 Allen (Mass.), 34; Hazard v. Loring, 10 Cush. (Mass.) 267; Whitaker v. Sumner, 20 Pick. (Mass.) 399; Eastman v. Avery, 23 Me. 248; Beeman v. Lawton, 37 Me. 543; Shaw v. Wilshire, 65 Me. 485.

³ Almy v. Wilbur, 2 Wood. & M. 271.

⁴ Miller v. McCormick Harvesting Machine Co. 35 Minn. 399. And see Nichols v. Barnes, 3 Dak. 148, 150.

⁵ Marsh v. Woodbury, 1 Met. (Mass.) 436; Winsor v. McLellan, 2 Story, 492; Bacon v. Bonham, 27 N. J. Eq. 209; Monroe v. Hamilton, 60 Ala. 226, 233, per Brickell, C. J.; Vanmeter v. McFaddin, 8 B. Mon. (Ky.) 435; Bank of U. S. v.

Huth, 4 Ib. 423, 448; Newby v. Hill, 2 Metc. (Ky.) 530. See, however, Garland v. Plummer, 72 Me. 397.

⁶ Williamson v. N. J. South. R. R. Co. 26 N. J. Eq. 311; Rowland v. Plummer, 50 Ala. 182; Spalding v. Paine, 81 Ky. 416.

The words "goods and chattels" in the registry acts do not include a mere chose in action, such as a debt, or claim on another for money due; and the assignment of such debt or claim for value, though not recorded, will be good against a subsequent attachment of such debt or claim. The words "goods and chattels" refer to and only include personal property which is visible, tangible, or movable, while the

of no effect.¹ A legacy is not a chattel, and therefore an assignment of it by way of mortgage need not be filed in accordance with a chattel mortgage act.²

Where one sold by a written contract certain goods, agreeing to take the purchaser's notes in payment therefor, and further agreeing that the purchaser should send to the seller all notes taken by him for any of the goods sold, and a list of all open accounts as collateral security for the notes, "and all the goods, as well as the proceeds, are to be held in trust by" the purchaser "for the payment of the notes to" the seller, it was held that the contract was not within the purview of the statute requiring registration in order to be operative against creditors.³

An agreement between a land-owner and another whereby the latter agrees to cultivate land and to receive one half the crops as wages, does not confer upon the latter the possession and control of the crop until it is gathered and divided; and although his interest in the crop may be assigned as security, yet such assignment is not necessarily a mortgage or in the nature of one, and need not be recorded.⁴

An assignment, in the form of a mortgage, of a permit to cut and remove timber, need not be recorded as a chattel mortgage. It is merely a contract. It conveys no property, and no interest in the land. It is only a license. So far, however, as it applies to timber cut before the assignment was made, the instrument is a mortgage and should be recorded.⁵

279. A mortgage embracing both real and personal property must generally be recorded twice, or recorded as a mortgage of realty and filed as a mortgage of personalty, in order to comply with the recording laws and protect both classes of property.⁶ But under a statute which provides for the recording of mortgages of personal property in the same office in which conveyances of real property are recorded, and simply requires the recording

word "chattels" is one of very large signification, and generally includes choses in action as well as all species of personal property; yet it is plain that it is used in this connection in a more restricted sense. *Kirkland v. Brune*, 31 Gratt. (Va.) 126.

¹ *Spalding v. Paine*, 81 Ky. 416.

² *Bacon v. Bonham*, 27 N. J. Eq. 209.

³ *Chemical Co. v. Johnson* (N. C.), 3 S. E. Rep. 723.

⁴ *Hudgins v. Wood*, 72 N. C. 256. See *Monroe v. Hamilton*, 60 Ala. 226.

⁵ *Putnam v. White*, 76 Me. 551.

⁶ *Stewart v. Beale*, 7 Hun (N. Y.), 405; *S. C.* 68 N. Y. 629.

officer to record such mortgages in a book kept for the purpose, a mortgage of both realty and personalty may be recorded in a book of records kept for recording mortgages of real estate, if it be shown to be the usage of the office to record such mortgages in the book containing such mortgages.¹

280. Chattels real, such as leases for years of real estate or assignments thereof by way of mortgage, are not within the acts relating to the recording or filing of chattel mortgages. Such leases are chattels real and not mere chattels. Such leases or assignments thereof, if required to be recorded at all, should be recorded under the statutes relating to the record of titles to real estate. Leases are not usually the subject of a mortgage, and when they are, the statutory provisions relating to chattel mortgages have no application thereto. These provisions relate to goods and chattels which can be removed from place to place, the possession of which may be changed, and not to chattels real or choses in action.²

The mortgagor may, however, be estopped by recitals or representations in the mortgage from claiming, as against the mortgagee, that the articles mortgaged are real estate, and not personal property.³

281. Fixtures.—If personal property, such as machinery or the like, not strictly fixtures, be included in a mortgage of the real estate upon which such fixtures are situated, and no possession of the same be taken by the mortgagee, and the mortgage be not recorded as a chattel mortgage, the property is of course liable to attachment at the suit of the mortgagor's creditors.⁴

In several states there are statutes which provide that mortgages of rolling stock and other fixtures of railroads shall be valid without recording or filing the same as chattel mortgages.⁵ Such a statute in New Jersey was held to apply to mortgages executed before its passage so far as to protect them against liens or titles

¹ *Anthony v. Butler*, 13 Pet. 423.

² *Booth v. Kehoe*, 71 N. Y. 341; *Breese v. Bange*, 2 E. D. Smith (N. Y.), 474; *Deane v. Hutchinson*, 40 N. J. Eq. 83.

³ *Lucy v. Gray*, 61 N. H. 151.

⁴ *Potts v. N. J. Arms & Ordnance Co.*

17 N. J. Eq. 395; *Gale v. Ward*, 14 Mass.

352. And see *Farmers' Loan & Trust Co. v. St. Jo. & Denver City Ry. Co.* 3 Dill. 412; see, also, *Tuck v. Olds*, 29 Fed. Rep. 738, a case of a mortgage upon a dock.

⁵ *Jones on R. R. Securities*, §§ 171-186.

acquired after the passage of such act ;¹ though it would not protect a mortgage given before the passage of the act, as against a levy under an execution also made prior to the passage of the act, because the creditor in such case had acquired a vested right by the levy of his execution.²

282. A schedule referred to in a mortgage and made part of it should be recorded with it, to give effectual notice to the public. The general description in the mortgage without the schedule may be sufficient to transfer the property ; but when the parties themselves have given it more particular description by a schedule, and have declared this to be a part of the mortgage, it must be regarded as an essential part of it ; and creditors and others are not to be excluded from a knowledge of the property embraced in the mortgage, by the omitting of an essential part of it from the record.³ If the mortgage and schedule are both left with the recording officer, they are sufficient notice to the public while they remain unrecorded ; but after the mortgage alone has been spread upon the record, that is the only record which the law recognizes ; for a person finding the mortgage without the schedule is not presumed to be advised from that circumstance that the schedule existed and was to be found in the office, and much less to be apprised of its contents, although it may still be in the hands of the recording officer.⁴

But if the schedule be merely referred to in the mortgage, and not annexed to it or made a part of it, there is no need of recording it.⁵

283. When a mortgage secures the performance of a written agreement, this forms no part of the mortgage, and need not be filed or recorded with it in order to render the record effectual.⁶ A chattel mortgage made the debt payable as follows, viz. : "The said principal sum and interest to be paid immediately at the expiration of five years from date, except in case default should be made in the performance of the conditions of a certain agreement

¹ Kelly v. Boylan, 32 N. J. Eq. 581.

² Williamson v. N. J. Southern R. R. Co. 29 N. J. Eq. 311.

³ Sawyer v. Pennell, 19 Me. 167.

⁴ Sawyer v. Pennell, *supra*.

⁵ Chapin v. Cram, 40 Me. 561. The case of Sawyer v. Pennell, *supra*, is referred to and distinguished.

⁶ Byram v. Gordon, 11 Mich. 531.

this day executed by," etc. This agreement provided that the debt was to be paid in monthly instalments of fifty dollars each. It was held that the mortgage was not invalidated by the failure to record or file the agreement referred to.¹

284. Separate defeasance. — A statute providing that when a bill of sale absolute in form appears, by a separate defeasance, to have been intended only as a mortgage, the person for whose benefit it was made shall not have the advantage or benefit of recording it, unless the defeasance be recorded with it, has no application to the case of a deed absolute upon its face, where no other instrument is executed, although it was intended merely as a security, and is in equity recognized as a mortgage.²

When a mortgage is made by an absolute bill of sale and a separate defeasance, and the former is recorded but not the latter, third persons may consider the sale absolute.³

285. The recording of a copy of a mortgage is of no avail, unless the statute expressly authorize such a record.⁴ The Supreme Court of Illinois, rendering a decision to this effect, said: "The statute in regard to chattel mortgages is in derogation of the common law, and should be strictly construed. It contemplates that an entry shall be made upon the docket of the justice, of the acknowledgment, together with the names of the mortgagor and mortgagee, and a description of the property mortgaged at the time when the acknowledgment is taken. The original mortgage is required to be recorded in the recorder's office, and it is the duty of the recorder correctly to transcribe the same. To do this, he must have the original before him. The law has made no provision for authenticating to the recorder a copy of such a mortgage; he has no authority to transcribe a supposed copy of such an instrument on the records of his office; and he is not responsible for the correctness of any such transcript. The copy or duplicate mortgage was not, and does not purport to have been, acknowledged as the law requires, and for that reason is invalid as an original mortgage."

¹ *Shuler v. Boutwell*, 18 Hun (N. Y.), 171.

² *Ing v. Brown*, 3 Md. Ch. Dec. 521.

³ *Gaither v. Mumford*, Taylor's Term (N. C.), 167.

⁴ *Porter v. Dement*, 35 Ill. 478; *Marsden v. Cornell*, 62 N. Y. 215.

IV. *Refiling.*

286. In New York, successive annual filings of the mortgage, after the first, are necessary to keep the mortgage on foot through a number of years, and prevent its becoming void as against creditors and subsequent purchasers and mortgagees in good faith of the mortgagor. This has been the requirement since the enactment of the statute of 1873.¹ Prior to that statute the statute in force was that of 1833,² which required but two conditions to the full protection of the mortgage by filing: first, that it be filed; and second, that it be refiled within thirty days of the expiration of a year from its filing.³ When thus refiled, it became a completed security, and no further filing was necessary to make it a continuing security. That statute did not require any further filing. But a new mortgage for the same debt upon the same property was not invalidated by neglect to refile the old mortgage.⁴ It was the policy of the statute that the state of the property and the incumbrances upon it from year to year should be made known, in one way or the other, to all interested.⁵

And under the present statute the giving of a new mortgage, instead of refiling and renewing the existing mortgage, does not affect the lien of the mortgagee, if no creditor levies an execution on the property after the first mortgage ceases to be a lien, and before a new one is filed.⁶

The requirement that a true copy of the mortgage shall be refiled is met by refiling the original with the proper statement indorsed thereon. There can be no reason why the refiling of the original should not have the same effect as the refiling of a copy of it.⁷

So also in Ohio⁸ and Michigan⁹ a chattel mortgage can be kept

¹ N. Y. Laws 1873, ch. 501; § 221.

² Laws of 1833, ch. 279.

³ *Newell v. Warren*, 44 N. Y. 244, reversing *S. C.* 44 Barb. 258, and overruling *Nitchie v. Townsend*, 2 Sandf. (N. Y.) 299; *Wisser v. O'Brien*, 3 J. & Sp. (N. Y.) 149; *S. C.* 44 How. Pr. 209.

⁴ *Lee v. Huntoon*, 1 Hoff. (N. Y.) Ch. 447.

⁵ *Meech v. Patchin*, 14 N. Y. 71; *Marsden v. Cornell*, 62 N. Y. 215.

⁶ *Walker v. Henry*, 85 N. Y. 130, 134;

Lee v. Huntoon, *supra*; *Osborn v. Alexander*, 40 Hun, 323; *S. C.* 17 Abb. N. C. 132.

⁷ *Stockham v. Allard*, 4 T. & C. (N. Y.) 279; *S. C.* 2 Hun, 67; and see *Fitch v. Humphrey*, 1 Den. (N. Y.) 163.

⁸ *Seaman v. Eager*, 16 Ohio St. 209; following *Nitchie v. Townsend*, *supra*; and see *Day v. Munson*, 14 Ohio St. 488.

⁹ *Briggs v. Mette*, 42 Mich. 12; *S. C.* 3 N. W. Rep. 231.

in force, as against creditors, only by successive filings from year to year. The lapse of a full year without a renewal of the filing renders the instrument invalid as against creditors. Each refiling places it, for the purpose of notice, on the footing of a new mortgage. In the latter state, the year within which any filing must be made begins to run from the exact time of the preceding filing, and is completed at the corresponding day and hour of the following year; the court construing the statute to require the clerk to note the exact time of the day when the filing took place. But in Michigan, where the statute merely requires that the clerk shall indorse the time when the affidavit of renewal was filed, it is held that it does not require the hour of filing to be noted, and therefore a renewal purporting to have been made on the anniversary of the filing of the mortgage is sufficient.¹ Annual renewals are to be made, not only for the information of the general creditors of the mortgagor, but quite as much for the information of those who may have become purchasers or mortgagees in good faith during the continuance of the earlier mortgage.²

287. A refiling of a mortgage must be effected within the time limited for that purpose. It is nugatory if done either before or after that time.³ A refiling after that time is not effectual to revive and continue the validity of the mortgage for a year after such refiling.⁴ In case the last day for the refiling of the mortgage falls upon Sunday, the mortgage must be refiled on or before the Saturday preceding.⁵

¹ *Griffin v. Forrest*, 49 Mich. 309; 13 N. W. Rep. 603. Cooley, J., said: "If a man is given a certain number of days after an event in which to perform an act or claim a right, he is likely to understand that he is allowed so many full days, and would be surprised if told that the fragment of the day on which the event took place was to be taken into the account against him. Another reason is that an inquiry into the actual hour and minute when an act is done is likely to be unsatisfactory and to lead to uncertain results; and it is undesirable that rights should depend upon such uncertainties. There are cases where it cannot be avoided; as, for example, where two or more chattel

mortgages upon the same property are filed on the same day; but these cases are exceptional. The general rule treats a day as merely a point in time; and rights are best conserved and guarded by doing so." And see *Burrill v. Wilcox Lumber Co.* 32 N. W. Rep. 824.

² *Briggs v. Mette*, 42 Mich. 12; 3 N. W. Rep. 231. Dissent from the New York cases to the contrary is expressed.

³ *Newell v. Warner*, 44 Barb. (N. Y.) 258; *Cooper v. Koppes* (Ohio), 15 N. E. Rep. 662.

⁴ *Reynolds v. Case*, 60 Mich. 76; *Newell v. Warner*, *supra*; overruling *Swift v. Hart*, 12 Barb. (N. Y.) 530.

⁵ *Nitchie v. Townsend*, 2 Sandf. (N. Y.) 299.

A refiling after the expiration of the time limited is not equivalent to the filing of a new mortgage, or to the original filing of a mortgage.¹ If the refiling be not done in strict compliance with the statute, the mortgage becomes void as against creditors and *bond fide* purchasers and mortgagees, and cannot be revived.² A refiling is necessary, although such purchasers and creditors have knowledge that the mortgage has not been fully discharged and satisfied, and that the mortgagor holds possession of the mortgaged property as the agent of the mortgagee.³ A mortgage which was valid when executed remains valid during the year, at the expiration of which it is required to be filed, irrespective of what is necessary to be done to keep it on foot for a succeeding year.⁴

The refiling required by law must be done within the thirty days immediately preceding the expiration of the year. A refiling before the commencement of the thirty days is unavailing. Such a mortgage will be postponed to the claims of subsequent creditors, purchasers, and mortgagees, though it is valid against the mortgagor.⁵

288. If the mortgagor becomes a non-resident of the state within the year, the requirement of refiling cannot be complied with. The declaration that the mortgage shall cease to be valid unless refiled operates as well when the refiling was rendered impossible by the removal of the mortgagor, as when it is omitted for any other reason.⁶

289. A refiling without a statement of the interest of the mortgagee in the property is ineffectual.⁷ This statement must be positive and distinct as to that interest, and must give such precise information of the amount due as to enable others to judge

¹ *Cooper v. Koppes*, (Ohio) 15 N. E. Rep. 662.

² *Cooper v. Koppes*, *supra*; *Biteler v. Baldwin*, 42 Ohio St. 125; *Swiggett v. Dodson* (Kans.), 17 Pac. Rep. 594; *Lockwood v. Crawford*, 29 Kans. 286.

³ *Swiggett v. Dodson*, *supra*; *McKennon v. May*, 39 Ark. 442. See §§ 314-318.

⁴ *Norris v. Sowles*, 57 Vt. 360; *Reynolds v. Case*, 60 Mich. 76.

⁵ *National Bank v. Sprague*, 20 N. J. Eq. 13; *Newell v. Warner*, 44 Barb. (N.

Y.) 258; *Rice v. Kahn* (Wis.), 35 N. W. Rep. 465; *Biteler v. Baldwin*, *supra*; *Case Threshing Machine Co. v. Campbell* (Oreg.), 13 Pac. Rep. 324.

⁶ *Dillingham v. Bolt*, 37 N. Y. 198; *S. C. 4 Abb. Pr. N. S.* 221, overruling *Dillingham v. Ladue*, 35 Barb. 38. See §§ 261, 303, 304.

⁷ *Fitch v. Humphrey*, 1 Den. (N. Y.) 163; *Marsden v. Cornell*, 62 N. Y. 215; *Osborn v. Alexander*, 40 Hun, 323.

how far it may be safe or prudent to give credit to the mortgagor.¹ "This statement is intended to supply the place of a new mortgage. It might be difficult to obtain a new mortgage at the end of a year. There would be no obligation on the part of the mortgagor to execute it, and no necessary inducement to him to do so. A convenient substitute, and one within the control of the creditor, was given by the section we are considering, and this substitute should contain all the essentials of the original mortgage. It should show especially what was the property thus subjected, and what was the amount claimed to be an incumbrance upon it. The detailed schedule is an important part of the mortgage, essential to be presented to an inquiring creditor. The creditor is entitled to have it presented in the renewal equally as in the original."² For these reasons a statement, in regard to a mortgage given as security for rent to accrue on a lease of real estate, which merely reads, "I hereby certify that the lease within referred to still exists in full force, and the interests of the parties and my interests thereunder remain unchanged, except so far as the same have been altered by the payment of the rent accrued," is insufficient.³

The "statement exhibiting the interest of the mortgagee in the property" must be made by him, in person or by attorney. A statement made by the mortgagor or by any third person, without any authority from the mortgagee, does not answer the requirement of statute. The mortgagor in possession of the property, and interested to keep off creditors, is regarded as the last person who should be allowed to file the copy and make the statement.⁴

290. But entire accuracy to the smallest amount is not required in the statement, in the absence of fraud, or, perhaps, gross negligence. Many circumstances may exist rendering it impossible for a mortgagee to state the sum remaining due with entire and perfect accuracy. A statement is sufficient, although it fail to give a credit of two dollars upon a debt of several hun-

¹ Theriot v. Prince, 1 Edm. Sel. Cas. 219.

³ Platt v. Stewart, *supra*.

⁴ Newell v. Warner, 44 Barb. (N. Y.)

² Platt v. Stewart, 13 Blatchf. 481, 495, 258. per Hunt, J.

dred dollars.¹ A statement, that "somewhere about the sum of sixty dollars, as near as can be ascertained," remained unpaid upon the mortgage, was accepted as sufficiently accurate.² A clerical error in the copy of a mortgage and the accompanying statement of the amount claimed, by which such amount is overstated by the sum of one hundred dollars, is fatal, and the validity of the mortgage as against creditors ceases with the year after the original filing.³ The error in the copy, or the variation in the amount, must be material in order to render the filing of the intended copy of no effect, for the law will not regard trifles.⁴

291. A statement which annexes and refers to another document filed with it is sufficient, if the two papers read together, in connection with the original mortgage, disclose intelligibly the interest of the mortgagee.⁵ All that is necessary is, that the statement should notify creditors of the extent of the mortgagee's lien.⁶ But a statement which simply refers to the original mortgage, and sets forth "that there is due and remaining unpaid on said mortgage, the conditions as mentioned in said mortgage lease; that his interests in the chattels therein described remain unchanged, and are hereby renewed for the amount above

¹ *Patterson v. Gillies*, 64 Barb. (N. Y.) 563.

² *Dillingham v. Bolt*, 37 N. Y. 198. In *Patterson v. Gillies*, *supra*, Talcott, J. said, "No doubt, if the mortgagee should fraudulently make a false statement by which the amount remaining unpaid should be wilfully exaggerated; or should wilfully, and with a view to hinder, embarrass, or mislead creditors or purchasers, make a statement so vague and indefinite as not to answer the substantial object and purpose of the statute, the statement must be held insufficient and void. And perhaps a grossly inaccurate or vague statement even, without any fraudulent intent, where it appeared that the mortgagee had the means of making it accurate and definite, might be held not to be a compliance with the statute. But when the statement is made in good faith, with reasonable care, and is substantially correct and accurate, we think the mortgagee has

complied with the spirit and intent of the statute."

³ *Ely v. Carnley*, 19 N. Y. 496; *S. C.* 3 E. D. Smith, 489.

⁴ *Dictum* in *Ely v. Carnley*, *supra*.

An understatement of the amount due does not affect the validity of the mortgage as to the amount which is stated; but the mortgagee cannot afterwards claim that a greater sum is secured by the mortgage. *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396. But it is invalidated by a material overstatement of the amount due. *Ely v. Carnley*, 3 E. D. Smith, 489; affirmed 19 N. Y. 496; *Mack v. Phelan*, 92 N. Y. 20. As against a purchaser who relied on the statement contained in the affidavit, the mortgagee is estopped to claim that more was due. *Rice v. Kahn* (Wis.), 35 N. W. Rep. 465.

⁵ *Beers v. Waterbury*, *supra*.

⁶ *Miller v. Jones*, 15 N. Bank. R. 150; *Mack v. Phelan*, *supra*.

written," was held insufficient; especially as in this case the lease contained various stipulations to be observed by the lessee which were secured by the mortgage clause, and no one, by inspecting the instrument put on file, could determine whether the lessee had observed the covenants or not, or whether any rent remained due or not.¹ "The affidavit," say the court, "was ambiguous. It gave no explanation as to the real state of things. No one desiring to redeem could ascertain from it what amount would be necessary. The sum the mortgagee was entitled to call for was not made known. It might have been five dollars, or it might have been five hundred, and it would be difficult to base any certain charge of false swearing upon it, if it were supposed, as it is not, to be dishonest. We are satisfied it failed to convey any such distinct information as the statute required."

292. Who may take advantage of an omission to refile.—In New York a creditor may take advantage of the omission to refile, as also may a purchaser or mortgagee, in case he becomes such during the continuance of the default. A general creditor may take advantage of the omission, though his right accrued previous to such default.² This distinction is founded upon the terms of the statute, declaring that the mortgage, unless refiled, "shall cease to be valid against the creditors of the mortgagor or against subsequent purchasers or mortgagees." The word *subsequent* is construed to mean subsequent to the omission to refile.³ It qualifies the term "purchasers and mortgagees," but not the term "creditors."

It is not necessary, in order to enable creditors to take advantage of such omission to refile the mortgage, that their debts should have become liens by judgment or attachment before the refileing, if they afterwards obtain judgment and levy execution upon the property.⁴ One who purchases the mortgaged property from the mortgagor's vendee, or from the person in whom it

¹ *Briggs v. Mette*, 42 Mich. 12; *S. C.* *Wray v. Fedderke*, 43 N. Y. Superior Ct. 335.
3 N. W. Rep. 231.

² *Thompson v. Van Vechten*, 27 N. Y. 568; *S. C.* 6 Bosw. 373. ⁴ *Thompson v. Van Vechten*, 27 N. Y. 568, 582; *Swift v. Hart*, 12 Barb. (N. Y.)

³ *Latimer v. Wheeler*, 30 Barb. (N. Y.) 530; *Nixon v. Stanley*, 33 Hun (N. Y.), 485; *Meech v. Patchin*, 14 N. Y. 71; 247; *Herrick v. King*, 19 N. J. Eq. 80, a case arising under the New York statute.

vested upon the mortgagor's death, is as much a subsequent purchaser as if he purchased directly from the mortgagor.¹

A subsequent mortgagee, the consideration of whose mortgage was a precedent debt, cannot, by the law of New York, question a prior mortgage for a default in refiling it; for such a mortgagee is not then considered a purchaser for value.²

In New Jersey and Wisconsin, however, the statute requiring a refiling is construed to have the effect to invalidate the mortgage in case of a failure to refile it within the time prescribed, both against creditors who may afterwards seize the property, and against purchasers who may afterwards buy it.³ But such a mortgage is void only as to those creditors who have raised the issue by their pleadings.⁴

293. Purchasers or mortgagees who become such before the expiration of the year from the first filing cannot take advantage of an omission to refile the mortgage. Such purchasers or mortgagees have notice of the existing mortgage, and take title subject to it. The statute was intended to prevent imposition upon them, and not to relieve them from incumbrances valid against them when they acquired their own titles. They stand in the position the mortgagor was in when they took their title from him.⁵ It follows that if two mortgages be executed by the same person upon the same property and filed the same minute, but one has priority of the other by agreement or intention of the parties, neither the neglect of the holder of the mortgage that has the prior lien to refile it within the year, nor the diligence of the owner of the other mortgage to refile his in due time, can affect

¹ *Dillingham v. Bolt*, 37 N. Y. 198; *S. C.* 4 Abb. Pr. N. S. 221; *Fox v. Burns*, 12 Barb. (N. Y.) 677.

² *Thompson v. Van Vechten*, 27 N. Y. 568; *S. C.* 6 Bosw. 373; 5 Abb. Pr. 458; *Wiles v. Clapp*, 41 Barb. (N. Y.) 645.

³ *Newman v. Tymeson*, 12 Wis. 448; *National Bank v. Sprague*, 21 N. J. Eq. 530.

⁴ *National Bank v. Sprague*, *supra*.

⁵ *New York*: *Meech v. Patchin*, 14 N. Y. 71; *Thompson v. Van Vechten*, 6 Bosw. 373; 5 Abb. Pr. 458; *Wiles v. Clapp*, *supra*; *Latimer v. Wheeler*, 29

Barb. 485; *Manning v. Monaghan*, 23 N. Y. 539; *Dillingham v. Ladue*, 35 Barb. 38; *Shutter v. Ward*, 16 N. Y. Weekly Dig. 69; *Lewis v. Palmer*, 28 N. Y. 271; *Jaqueth v. Merritt*, 29 Hun, 584. *Wisconsin*: *Rockwell v. Humphrey*, 57 Wis. 410, 421. *Other Cases*: *National Bank v. Sprague*, 21 N. J. Eq. 530; *Edson v. Newell*, 14 Minn. 228; *Frank v. Playter*, 73 Mo. 672; *Lowe v. Wing*, 56 Wis. 31; 13 N. W. Rep. 892. See, *contra*, in *Michigan* and *Ohio*: *Briggs v. Mette*, 42 Mich. 12; *S. C.* 3 N. W. Rep. 461; *Day v. Munson*, 14 Ohio St. 488.

the respective rights of the parties. The latter mortgagee had notice of the rights of the former, and took his mortgage subject to that, and continues to hold it subject to it.¹

Neither does the omission to refile as provided by statute invalidate the mortgage as between the mortgagee and one claiming through a sale made within the year, under an attachment against the mortgagor.²

Neither does the omission to refile the mortgage affect its validity as against a subsequent mortgagee with notice.³ One purchasing with notice is not a purchaser in good faith. If he had notice enough to put him on inquiry, he is bound to make inquiry, and is held to have had notice of everything to which such inquiry would have reasonably led.⁴

An assignee in bankruptcy is not a creditor or a purchaser within the meaning of a statute in regard to renewing chattel mortgages so as to require that a mortgage, which is valid when proceedings in bankruptcy are commenced against the mortgagor, shall, in order to keep it valid as against the assignee, be refiled after the proceedings in bankruptcy have been commenced.⁵

294. There is no occasion for refileing if the mortgagee has taken actual possession of the property.⁶ The mortgage is valid against a judgment creditor levying upon the property after the mortgagee has taken possession, notwithstanding such possession is obtained after the expiration of one year from the filing of the mortgage, and no affidavit of renewal or continuance is filed.⁷ Where two chattel mortgages of the same property, but of different dates, have been duly filed, but neither of them is refiled at the expiration of one year, and the junior mortgagee, whose mortgage was last filed, gets possession of the property, he is entitled to hold it as against the other. The fact that the junior mortgagee failed to comply with the statute does not render his mort-

¹ *Wray v. Fedderke*, 43 N. Y. Superior Ct. 335.

² *Frank v. Playter*, 73 Mo. 672.

³ *Thompson v. Van Vechten*, 6 Bosw. (N. Y.) 373; *Hill v. Beebe*, 13 N. Y. 556; *Lewis v. Palmer*, 28 N. Y. 271; *National Bank v. Sprague*, 21 N. J. Eq. 530; and see *De Courcey v. Little*, 19 N. J. Eq. 115;

Williamson v. N. J. Southern R. R. Co. 26 N. J. Eq. 398.

⁴ *Canal Boat Independence*, 9 Ben. 395.

⁵ *Carlisle v. Davis*, 9 Ben. 18.

⁶ *Porter v. Parmley*, 52 N. Y. 185, per Peckham, J.; *National Bank v. Sprague*, *supra*; *Frank v. Playter*, *supra*.

⁷ *Dayton v. People's Savings Bank*, 23 Kans. 421.

gage invalid as against the other. It is true that each of the mortgages as to the other would be unprotected by the registry laws after the expiration of the year; but he who first obtained possession of the property would acquire the prior right.¹

295. A possession by the mortgagee sufficient to obviate the necessity of refiling must be an actual change of possession. Mere words will not effect a change in law where there is none in fact. Thus, where there was a mortgage of the furniture of a hotel made by one member of a partnership which was conducting the hotel and using the furniture, an agreement was made between the mortgagor and mortgagee, after default in payment, that a partner of the former should retain possession of the property for the latter; but inasmuch as both partners continued in the actual use of the property in the hotel until after its seizure by a creditor, it was held that there was no change of possession which would render a refiling unnecessary.² If the mortgagee takes actual possession of the property and removes it to another place, the fact that he employs the mortgagor as his agent to look after the property does not invalidate his possession.³

The taking possession of the mortgaged property before the expiration of such time excuses the mortgagee from the obligation of refiling the mortgage;⁴ and the taking possession after the expiration of the year, but before a levy of execution upon the property, makes the mortgage valid and effective against the execution creditor.⁵ But the mere verbal delivery of the property, though it be of a bulky nature, such as stacks of grain in a field, is not such a change of possession as will relieve the mortgagee of the necessity of renewing the mortgage.⁶

There must be a change in the control of the property. Where the mortgagor was a member of a firm which was using the mortgaged chattels, and in accordance with an agreement between the parties after default, the mortgagor's partner retained possession

¹ *Brachmann v. Louis*, 1 Dis. (Ohio) 288.

² *Porter v. Parmley*, 52 N. Y. 185.

³ *Dayton v. People's Savings Bank*, 23 Kans. 421.

⁴ *Otis v. Sill*, 8 Barb. (N. Y.) 102; *National Bank v. Sprague*, 21 N. J. Eq. 530;

Porter v. Parmley, 52 N. Y. 185, per Peckham, J.; *S. C.* 34 N. Y. Superior Ct. 398; 13 Abb. Pr. N. S. 104; *Wood v. Weimer*, 104 U. S. 786.

⁵ *Dayton v. People's Savings Bank*, *supra*.

⁶ *Menzies v. Dodd*, 19 Wis. 343.

for the mortgagee, but the firm continued to use it as before, it was held that there was no such change of possession as would dispense with a refiling of the mortgage.¹

296. By advertising the property within that time for sale under a power, the necessity of refiling a mortgage within a limited period is obviated, though the sale do not take place until after the expiration of the year.²

If there has been a conversion of the mortgaged property within the year after filing, so that the mortgagee has a right of action for the taking of the property, it is not necessary for him, in order to preserve his right to recover, either to commence an action within the year from such filing, or to renew the mortgage by refiling it.³

297. A refiling is not rendered unnecessary by the mere fact that the mortgagor has made default, and the mortgage has become absolute by its terms. A refiling is always necessary to preserve the mortgagee's title, unless he has taken possession, but not after that.⁴ The mortgage is not dead though there be a forfeiture of the condition. The mortgagor may compel the mortgagee to receive payment and restore the property. Until something further than mere forfeiture has occurred to change the relations of the parties, such as the mortgagee's taking possession or bringing suit to foreclose, the same reason remains for refiling that existed before forfeiture. The mortgagor is, to the public, the apparent owner. The statute requires a statement to be filed, to show the true interest of the parties, for the protection of the public. Therefore the mortgage, though a forfeiture has occurred, ceases to be valid if not refiled.⁵

298. The refiling of a mortgage is not an extension of credit, and does not prevent the mortgagee's insisting upon a forfeiture.⁶

¹ *Porter v. Parmley*, 52 N. Y. 185, reversing *S. C. 2 J. & Sp.* 398.

² *Otis v. Sill*, 8 Barb. (N. Y.) 102.

³ *Case v. Jewett*, 13 Wis. 498; *Newman v. Tymeson*, 12 Wis. 448; *Bates v. Wilbur*, 10 Wis. 415.

⁴ *Porter v. Parmley*, *supra*; *In re Le-land*, 10 Blatchf. 503; *Ely v. Carnley*,

19 N. Y. 496; *S. C. 3 E. D. Smith*, 489; *Steele v. Benham*, 84 N. Y. 634; *Randall v. Dunbar*, 26 Hun (N. Y.), 393; *S. C. 14 Week. Dig.* 332; *Succession of Ynogoso*, 13 La. Ann. 559.

⁵ *Porter v. Parmley*, *supra*.

⁶ *Dane v. Mallory*, 16 Barb. (N. Y.) 46; *Fuller v. Acker*, 1 Hill (N. Y.), 473.

V. Law of the Place of Contract.

299. The law of the place of contract, when this is also the place where the property is, governs as to the nature, validity, construction, and effect of a mortgage, which will be enforced in another state as a matter of comity, although not executed or recorded according to the requirements of the law of the latter state.¹ Thus, if a mortgage be made in New Hampshire of property situated there, and it be duly recorded, so that no change of possession be necessary for its validity under the laws of that state, and afterwards the property be removed to Vermont, where at the time no mortgage is valid without a delivery of possession, and it be there attached by the debtor's creditors, the mortgagee may recover it from the attaching officer, because his lien, being valid by the laws of New Hampshire, is equally valid in Vermont.²

A mortgage, valid in the state where it was made, is not invalidated by the mortgagor's executing in another state, upon the same day, a general assignment of his property in the latter state, giving certain preferences, valid by the laws of that state, but not valid by the laws of the former state. The two instruments cannot be construed together, as parts of the same transaction, so as

¹ § 260; *Bank of U. S. v. Lee*, 13 Pet. 107.

Alabama: *Beall v. Williamson*, 14 Ala. 55.

Arkansas: *Hall v. Pillow*, 31 Ark. 32.

Connecticut: *Vanbuskirk v. Hartford F. Ins. Co.* 14 Conn. 583.

Indiana: *Ames Iron Works v. Warren*, 76 Ind. 512; *Blystone v. Burgett*, 10 Ind. 28.

Iowa: *Arnold v. Potter*, 22 Iowa, 194; *Simms v. McKee*, 25 Iowa, 341; *Smith v. McLean*, 24 Iowa, 322.

Kansas: *Ramsey v. Glenn*, 33 Kans. 271.

Maryland: *Wilson v. Carson*, 12 Md. 54.

Massachusetts: *Langworthy v. Little*, 12 Cush. 109; *Rhode Island Central Bank v. Danforth*, 14 Gray, 123.

Minnesota: *Keenan v. Stimson*, 32 Minn. 377.

Mississippi: *Barker v. Stacy*, 25 Miss. 471.

Missouri: *Feurt v. Rowell*, 62 Mo. 524.
New Hampshire: *Cushman v. Luther*, 53 N. H. 562; *Ferguson v. Clifford*, 37 N. H. 86; *Lathe v. Schoff*, 60 N. H. 34; *Offut v. Flagg*, 10 N. H. 46, 50.

New York: *Clark v. Tucker*, 2 Sandf. 157; *Edgerly v. Bush*, 81 N. Y. 199; *Martin v. Hill*, 12 Barb. 631; *Nichols v. Mase*, 25 Hun, 640; *Tyler v. Strang*, 21 N. Y. 198.

Ohio: *Kanaga v. Taylor*, 7 Ohio St. 134.

Pennsylvania: *Jeter v. Fellowes*, 32 Pa. St. 465.

South Carolina: *Ryan v. Clanton*, 3 Strob. L. 411.

² **Vermont**: *Cobb v. Buswell*, 37 Vt. 337; *Norris v. Sowles*, 57 Vt. 360; *Taylor v. Boardman*, 25 Vt. 581; *Jones v. Taylor*, 30 Vt. 42, overruling *Skiff v. Solace*, 23 Vt. 279.

to avoid the mortgage, upon the ground that the assignment is fraudulent as to creditors, and that the whole is therefore vicious.¹

A resident of the State of New York executed a mortgage of a span of horses to another resident of that state, where also were the horses at that time. Subsequently the mortgagor took the horses to Canada, where they were sold by a regular trader dealing in horses to one who purchased in good faith without knowledge of the mortgage. Under the laws of Canada property cannot be reclaimed, from one so purchasing, without refunding to him the price paid. A resident of New York afterwards bought the horses of such purchaser, but left them in Canada. The mortgagee demanded the horses of the last purchaser, and in an action brought in New York against him for their conversion, was held entitled to recover.²

¹ *Morse v. Powers*, 17 N. H. 286.

² *Edgerly v. Bush*, 81 N. Y. 199. Chief Justice Folger, delivering the opinion of the court, said: "The law of the domicil, and the law of the then *situs* of the property, and the law of the forum in which the remedy is sought, all concur to sustain the right of the plaintiff. The law of the domicil of the owner of personal property, as a general rule, determines the validity of every transfer made of it by him. By that law, as it exists in this case, the plaintiff became the owner of this property before it was taken beyond its operation. By that law, too, an owner of property may not be divested of it without his consent, or by due process of law; plainly not by a dealing with it by others without his knowledge, assent, or procurement. Still, another state may make provision by statute in respect to personal property actually within its jurisdiction. Though a transfer of personal property, valid by the law of the domicil, is valid everywhere as a general principle, there is to be excepted that territory in which it is situated, and where a different law has been set up, when it is necessary for the purpose of justice that the actual *situs* of the thing be examined. Yet the statutes of that land have no extra-territorial force *proprio vigore*, though often permitted by comity to operate in another state

for the promotion of justice, where neither the state nor its citizens will suffer any inconvenience from the application of them. The exercise of comity in admitting or restraining the application of the laws of another country must rest in sound judicial discretion, dictated by the circumstances of the case. It is plain that on no principle applicable to this case could the sale of the plaintiff's property by another having no authority from him, to his wrong indeed, be upheld, save that it was authorized by the statute of Lower Canada. So that the question is one entirely of the comity to be shown by the courts of this state to the enactments of another country. Those statutes not only enact the rule of market-overt as it prevails in general in England, but carry it further, and make, as in the city of London, every sale by a trader dealing in like articles as good as a sale at market-overt. That rule does not obtain in this state. It has not been our policy to establish it. Our policy has been, and is, to protect the right of ownership, and to leave the buyer to take care that he gets a good title. It would be to the contravention of that policy, and to the inconvenience of our citizens, if we should give effect to these statutes of Lower Canada, to the divesting of titles to movables lawfully acquired and held by our general and

A mortgage duly executed in a state where possession of the mortgaged property by the mortgagor after maturity of the mortgage debt does not invalidate the mortgage, is valid in Illinois, when the property is brought there by the mortgagor in possession, against a creditor of his, notwithstanding that by the law of that state such possession in the mortgagor would be fraudulent *per se* as to the mortgagor's creditors, had the mortgage been executed there.¹

300. But an exception to this rule prevails in those states which have not adopted the policy of recording mortgages of personal property. Thus, a chattel mortgage being wholly unknown to the law of Louisiana, the courts of that state do not feel bound by the comity of nations to enforce such a mortgage made in another state.² And so in Pennsylvania, where the rule of the common law prevails, by which a sale or mortgage of personal property, unaccompanied by delivery of possession, is void as against the intervening rights of creditors and purchasers, it is held that while a mortgage made in another state and duly recorded there, so that it is valid there without a delivery, might be enforced by the courts of Pennsylvania as between the parties, these courts would not enforce such mortgage as against a creditor or purchaser who had acquired rights in the property after it had been brought to that state.³ "By the comity of nations, as

statute law, without the assent or intervention and against the will of the owner by our law. Notions of property are slight, when a *bonâ fide* purchase of stolen goods gives a good title against the original owner. We are not required to show comity to that extent; especially as it is to our citizens alone that we are administering justice."

¹ *Mumford v. Canty*, 50 Ill. 370.

² *Delop v. Windsor*, 26 La. Ann. 185.

³ *MacCabe v. Blymyre*, 9 Phila. (Pa.) 615. "As between the parties to the chattel mortgage, Pennsylvania courts could safely enforce the validity of the mortgage, and would do so. There would be no public interest or policy of law that would require us to hold the bill of sale or mortgage void, as between the parties to it, for want of delivery of possession of

the chattel. But it would be an extraordinary stretch of comity that would induce a court here to hold that a Maryland chattel mortgage shall be made the means of defrauding our own citizens. Either the *lex rei sitæ* must prevail over the *lex loci contractus*, or we must open a wide door for fraud, to the detriment of citizens on both sides of the border. Would it be reasonable to require that the purchaser should have first ascertained where this migratory doctor came from, and then have had the records of all counties in Maryland searched for chattel mortgages? Or is it fairer to hold that the mortgagees, by allowing the mortgagor to retain possession of the horse and bring it into Pennsylvania, and exercise notorious acts of ownership, lost their rights under the mortgage as against an intervening Penn-

a general rule, a contract valid where it is made is valid everywhere, and the law of the place of the contract controls as to the construction of it. Without this rule, there could not safely be commercial or business intercourse between citizens of different nations. But the laws of a nation or state have not, *ex propria vigore*, any binding force beyond the limits of its territory. Any effect they have is *ex comitate*. And the judicial tribunal in Pennsylvania must determine how far comity is to be permitted to interfere with the domestic interests and policy of the state."

301. Although the mortgage be not executed in conformity with the laws of the state to which the property is afterwards removed, if executed and recorded according to the laws of the state or country of its execution, it is effectual to hold the property in the state to which it is removed.¹ This is in accordance with the general rule of law that the place of contract governs as to its nature, validity, construction, and effect. In determining whether a mortgage was executed according to the laws of a foreign state, those laws must be proved as facts by evidence addressed to the court, and not to the jury.²

There is some authority contrary to this proposition. It is true that the laws regarding the recording of mortgages have no force beyond the jurisdiction of the sovereignty enacting them; and it is therefore held by some courts that a foreign record is no notice to creditors of the mortgagor when he has brought the property from a foreign state where it was duly recorded. Thus, where a mortgage given in Canada, by a person residing there, was properly recorded as required by Canadian law, but the mortgagor was left in possession of the property, and he brought it into Michigan, where it was taken and sold on execution against the mortgagor, it was held that the title under the execution sale was superior to that under the mortgage.³ And so in Vermont it

sylvania creditor or purchaser? No people are bound to enforce a contract in contravention of their public law and policy. Whilst a lien created by the *lex loci* will generally be enforced wherever the property may be found, yet this is not necessarily so in preference to claims arising under the *lex rei sitæ*. The comity extended to the *lex loci* must yield to the positive law and public interests of the

place where the remedy is sought." Per Hall, J.

¹ *Ferguson v. Clifford*, 37 N. H. 86; *Kanaga v. Taylor*, 7 Ohio St. 134; *Hall v. Pillow*, 31 Ark. 32.

² *Ferguson v. Clifford*, *supra*.

³ *Montgomery v. Wight*, 8 Mich. 143; followed in *Boydson v. Goodrich*, 49 Mich. 65; 12 N. W. Rep. 913.

was formerly held that a mortgage of chattels executed in another state and valid there without a change of possession did not protect the property from attachment in Vermont when brought into that state and there found in the mortgagor's possession, whether brought there for a temporary purpose or not.¹ This was in conformity with the local law of Vermont, which required a change of possession in all cases to protect the property from the mortgagor's creditors and subsequent purchasers. By later decisions, however, it is held that the local rule of policy does not extend to a transfer made in another state, where the parties resided and where the property was located at the time of the transfer, so as to defeat a title which was perfect by the laws of that state.² But this local rule of policy is universally applied in Vermont to all transfers made in another state of chattels actually in Vermont at the time, though in the hands of a third person, and though such transfers in the state where made were valid without a change of possession.³

302. A statute which requires a mortgage on property brought from another state to be recorded within a limited time, and on failure of such record makes such property liable to the debts of the person in possession, but is silent as to purchasers, does not make invalid as to the latter a mortgage valid in the state where it was executed.⁴ In the absence of any express provision of statute invalidating such mortgages as to purchasers, it is the duty of the court to infer that the legislature did not intend to change the law as to them.

303. A statute relating to the recording of mortgages has no application to a mortgage made outside the state, unless specially made so, though the property be afterwards brought within the state;⁵ and it does not matter that such mortgage was made by a citizen of the state while temporarily absent in another state with such property.⁶ If the mortgage be duly recorded in

¹ *Skiff v. Solace*, 23 Vt. 279; *Woodward v. Gates*, 9 Vt. 358. But these early Vermont cases are overruled in later cases.

² *Cobb v. Buswell*, 37 Vt. 337; *Jones v. Taylor*, 30 Vt. 42.

³ *Rice v. Curtis*, 32 Vt. 460; *Martin v. Potter*, 34 Vt. 87. See § 305.

⁴ *Beall v. Williamson*, 14 Ala. 55.

⁵ *Fairbanks v. Bloomfield*, 5 Duer (N. Y.), 434. See §§ 261, 288.

⁶ *Langworthy v. Little*, 12 Cush. (Mass.)

the state where it was executed, and the mortgagor afterwards takes the property with him into another state, no registration of the mortgage in the latter state is necessary unless made so by positive statute of that state.¹

304. In Michigan, under a statute making no provision for the recording of a non-resident's mortgage, an effectual mortgage can only be made by the mortgagee's taking possession.² In that state it is held that a mortgage executed and recorded in another state is not valid against the claims of attaching creditors, when the property is brought within that state.³ As has already been noticed, the rule in that state is not in accord with the general rule that a mortgage valid by the laws of the state where it was executed, and where the property was at the time, is valid in any other state to which the property may be removed, without further registration, unless the laws of such other state require the recording of the mortgage in that state when the property is brought into it.

It is not unusual to provide for the filing of the mortgage in the town, city, county, or other registry district in which the property is at the time, if the mortgagor be a non-resident.

305. The *lex situs* governs when a mortgage is executed in a state other than that in which the property is situate.⁴ Though it be executed according to the requirements of the law of the domicile of the owner in another state, the mortgage will be invalid as against attaching creditors in the state where the property is located unless the mortgage conforms to the laws of the latter state. The mortgage, to be valid, must be executed, acknowledged, and recorded according to the law of the place where the property is at the time. Thus, if a mortgage be made in New York, where the parties reside, of property situate in Illi-

¹ *Beall v. Williamson*, 14 Ala. 55; *Offutt v. Flagg*, 10 N. H. 46; *Peterson v. Kargler* (Ga.), 3 S. E. Rep. 655; *Hubbard v. Andrews*, 76 Ga. 177. See §§ 261, 288.

² *Montgomery v. Wight*, 8 Mich. 143, per Campbell, J.

³ *Boydson v. Goodrich*, 49 Mich. 65.

⁴ *Clark v. Tarbell*, 58 N. H. 88; *Hardaway v. Semmes*, 38 Ala. 657; *Green v. Van Buskirk*, 7 Wall. 139, overruling *S.*

C. 2 Keyes (N. Y.), 119; *Rice v. Courtis*, 32 Vt. 460; *Martin v. Potter*, 34 Vt. 87; *Whitman v. Conner*, 40 N. Y. Superior Ct. 339; *Guillander v. Howell*, 35 N. Y. 657; *Golden v. Cockril*, 1 Kans. 259; and see *Denny v. Faulkner*, 22 Kans. 89. *Contra*, *Runyon v. Groshon*, 12 N. J. Eq. 86; *Blystone v. Burgett*, 10 Ind. 28; *Ames Iron Works v. Warren*, 76 Ind. 512.

nois, and the property be attached in the latter state before the mortgage is there recorded, or the property delivered in accordance with the laws of that state, the validity of it is determined by the laws of that state and not by the laws of New York.¹ As a general rule, personal property is governed by the law of the domicile of the owner, and not by the law of the *situs* of the property; but a transfer of such property by way of mortgage is an exception to the rule, and the *lex situs* and not the *lex domicilii* governs chattel mortgages.² The theory that the voluntary transfer of personal property is to be governed everywhere by the law of the owner's domicile proceeds on the fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located. But this fiction is by no means of universal application, and, as Judge Story says, "yields, whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined."³

A recent decision of the Supreme Court of New Hampshire is equally emphatic, that a mortgage of chattels located in that state, though executed according to all the requirements of the law of the domicile of the owner in another state, is invalid as against attaching creditors in New Hampshire who are citizens of that state, unless the mortgage be recorded there in conformity to the laws of New Hampshire.⁴

¹ *Green v. Van Buskirk*, 7 Wall. 139; S. C. 3 Wall. 458; 5 Wall. 307, reversing *Van Buskirk v. Warren*, 4 Abb. (N. Y.) App. Dec. 457; *Edgerly v. Bush*, 81 N. Y. 199; *Keller v. Paine*, 107 N. Y. 83.

² *Ames Iron Works v. Warren*, 76 Ind. 512.

³ In *Green v. Van Buskirk*, 7 Wall. 139, 150, Mr. Justice Davis, delivering the opinion of the Supreme Court in the case cited, said further: "We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a vexed question, on which learned courts have differed; but after all there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed.

And this principle of comity always yields when the laws and policy of the state where the property is located have prescribed a different rule of transfer from that of the state where the owner lives." By the laws of Illinois an attachment on personal property takes precedence of an unrecorded mortgage executed in another state where record is not necessary; and there is no reason why a different effect should be given to the attachment because the owner of the chattels, the attaching creditor, and the mortgage creditor are all residents of such other state.

⁴ *Clark v. Tarbell*, 58 N. H. 88. Foster, J., delivering the opinion of the court, said: "Every state has entire jurisdiction over all property, personal as well as real, within its own territorial limits, and the laws of the state regulate and control its sale and transfer, and all rights which may

306. A mortgage is presumed to have been executed in the state where it is sought to be enforced, until the contrary appears.¹ But there can be no such presumption when the mortgage purports to be executed in another state.²

The statute of another state, upon which a mortgagee relies to show the validity of his mortgage, must be specially pleaded.³

307. The *lex fori* determines the remedies upon a mortgage executed in another state or country. These are regulated exclusively by the laws of the state to which the property is removed, and in which the creditor seeks to enforce his rights, or any party in interest seeks to pursue any claim against the subject matter. The *lex fori* determines whether the mortgaged property is subject to attachment, and what the proper mode of proceeding is in making the attachment.⁴

VI. Actual Notice.

308. Notice, in the sense here used, includes as well that which is actual, that which is implied, and that which is constructive. It includes actual knowledge on the part of a purchaser of an existing mortgage, and also conscious knowledge upon his part of having the means of actual knowledge; and it includes knowledge derived from direct communication of the fact, and knowledge that may be gathered from attendant facts and circumstances which would lead to a knowledge of the fact itself. A purchaser or mortgagee who is put upon inquiry by the facts and circumstances within his knowledge is charged with notice of whatever such inquiry would have imparted. If he abstain from inquiry, whether designedly for the purpose of avoiding knowl-

be affected thereby. . . . If a foreigner or citizen of another state send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects it has the right to regulate. And if two persons in another state choose to bargain concerning property which one of them has in a chattel not within the jurisdiction of the place,

they cannot expect that the rights of persons in the country where the chattel is will be permitted to be affected by their contract." Followed in *Ames Iron Works v. Warren*, 76 Ind. 512.

¹ *Franklin v. Thurston*, 8 Blackf. (Ind.) 160; *Hutchins v. Hanna*, 8 Ind. 533; *Shaw v. Wood*, *Ib.* 518.

² *Blystone v. Burgett*, 10 Ind. 28.

³ *Blystone v. Burgett*, *supra*.

⁴ *Ferguson v. Clifford*, 37 N. H. 86.

edge, or negligently, he cannot be regarded as a *bonâ fide* purchaser without notice.¹ But the purchaser must first be put upon inquiry before his failure to make inquiry will invalidate his mortgage. Mere want of caution, or mere negligence in making inquiries as to prior incumbrances, is no ground for charging a mortgagee with notice of such incumbrances. When circumstances are shown to exist which would put an ordinarily prudent business man upon inquiry as to prior incumbrances, then he is charged with notice of such facts as he could have ascertained upon inquiry; but where circumstances alone are relied upon, with no proof of actual knowledge, they must be of such character that failure to make inquiry amounts to bad faith. A want of caution in making inquiries will not charge the mortgagee with notice; he is chargeable with notice only when he has designedly abstained from making them for the very purpose of avoiding knowledge.²

But notice, to be effectual, should be equivalent to actual knowledge, and cannot be inferred from an opportunity of knowledge, unless the opportunity be such that the inference of knowledge is conclusive. Therefore an instruction that a prior unrecorded mortgage would have no validity against a subsequent mortgagee of the same property unless the latter knew of the bill of sale and all its material provisions, "or had full opportunity or means of acquiring actual knowledge" of it, is erroneous.³

Under this rule in regard to the effect of notice, an allegation of notice to and knowledge by a subsequent purchaser that the prior mortgage was made upon full consideration and in good faith, is sufficient without alleging actual fraud in such subsequent purchaser.⁴

The doctrine of notice, whether applied to mortgages of real or personal property, is the same. No distinction in the application of the doctrine can be based upon a distinction between the two classes of property.⁵

¹ Allen v. McCalla, 25 Iowa, 464; Moline Plow Co. v. Braden, 71 Iowa, 141; Oliver v. Sanborn, 60 Mich. 346; 27 N. W. Rep. 527; Mack v. Phelan, 92 N. Y. 20. See Jones on Mortgages, §§ 570-609.

² Millar v. Olney (Mich.), 37 N. W. Rep.

558; Ferguson v. Glassford, 35 N. W. Rep. 820; Larzelere v. Starkweather, 38 Mich. 96.

³ Foster v. Gillespie, 68 Mo. 643.

⁴ Gooding v. Riley, 50 N. H. 400.

⁵ See Jones on Mortgages, 570-609, on the general subject.

309. Actual notice, to be effectual, should be notice of all which the statute requires to be recorded.¹

Actual notice of the existence of a mortgage is without effect if the mortgage be invalid by reason of an insufficient description.²

Notice of a mortgage which refers to a schedule of the property, and declares this to be a part of the mortgage, is not sufficient without clear notice of such schedule. Notice of the schedule cannot be inferred from notice of the mortgage.³

A purchaser or creditor who has notice that a mortgage to some one exists, cannot avoid the effect of such notice by showing that he believed that the mortgage was withheld from record in order to delay and defraud creditors.⁴

One who purchases property in the actual possession of a prior mortgagee is put upon inquiry as to the title of the holder of the property, and in legal effect has notice of the incumbrance.⁵

A mortgage was executed in which the property was referred to as being subject to an earlier unrecorded mortgage to a third person. The mortgagor then executed another mortgage to the same person, in which reference was made, for a description of the property, to the previous mortgage. It was held that this last mortgage was subject to the unrecorded mortgage referred to in the previous mortgage.⁶

The fact that a purchaser of cotton has knowledge of the existence of a debt on the part of the seller for unpaid purchase money for the land on which the cotton was raised, does not make him chargeable with notice of an unrecorded mortgage upon the cotton crop for such purchase money.⁷

A mortgagee of chattels which have previously been conveyed by an unrecorded bill of sale is not chargeable with notice of such prior bill of sale by a clause in his mortgage stating that "the said party of the first part warrants the title against all persons, except an existing mortgage of record in Poweshiek County;" nothing further appearing to show that he had notice.⁸

310. Actual notice may be proved by facts and circumstances. A purchaser of property at a sale upon execution

¹ *Sawyer v. Pennell*, 19 Me. 167.

² *Barr v. Cannon*, 69 Iowa, 20.

³ *Sawyer v. Pennell*, *supra*.

⁴ *Allen v. McCalla*, 25 Iowa, 464.

⁵ *Smith v. Zurcher*, 9 Ala. 208.

⁶ *Eaton v. Tuson*, 145 Mass. 218; 13 N. E. Rep. 488.

⁷ *Bell v. Tyson*, 74 Ala. 353.

⁸ *Clark v. Barnes* (Iowa), 34 N. W. Rep. 419.

against the mortgagor was properly charged with notice of a mortgage upon it, upon proof that the existence of the mortgage was known and talked of in the neighborhood, and publicly proclaimed at the sale.¹

Upon the question whether a purchaser or creditor had notice of a prior unrecorded mortgage, any competent evidence tending to establish or disprove the fact is admissible. An imperfect record of a mortgage of corporate shares on the books of the corporation may, as a means of knowledge, be evidence on the question whether a creditor of the mortgagor, levying an execution on the shares, had notice of the existence of the mortgage.² And so the existence of a defective record of a mortgage upon the books of the town or county where the mortgage should be recorded may be proved for the same purpose. Of course, such imperfect record, not being constructive notice, does not amount to anything as proof of actual notice until further evidence be given that the creditor or purchaser had knowledge of the record. As negating the existence of such notice, the purchaser may prove the declarations of the mortgagor to him that the same was unincumbered.³

Evidence of the erasure of a clause in a mortgage, to the effect that the mortgaged goods were "free and clear from all incumbrances, liens," etc., is proper to go to the jury upon the question of the mortgagee's actual notice of a prior mortgage subsequently recorded.⁴

Whether the burden of proof is on the purchaser to show that he purchased without notice, or upon the mortgagee to show that the purchaser had notice, is a question upon which the cases are not agreed. On the one hand, it is said that the presumption is that the purchaser bought without notice, and therefore that the burden is on the mortgagee to show such notice.⁵ On the other hand it is said that, a mortgage being effectual between the parties without record, and the title of the mortgagee *prima facie* valid, it is incumbent upon one who claims to be a purchaser in good faith without notice, to prove this affirmatively.⁶

¹ *Merrill v. Dawson*, Hemp. 563.

⁴ *Williams v. Brosnahan* (Mich.), 33

² *Piper v. Hilliard*, 58 N. H. 198. See, N. W. Rep. 739.

also, *S. C.* 52 N. H. 209, and *Hastings v. Cutler*, 24 N. H. 481.

⁵ *Rogers v. Pierce*, 12 Neb. 48.

⁶ *McNeil v. Finnegan*, 33 Minn. 375.

³ *Sumner v. Dalton*, 58 N. H. 295.

311. Notice by a debtor to a sheriff when he was proceeding to attach or to levy upon property is not notice to the creditor for whom the levy is made.¹ Notice which merely puts a creditor upon inquiry, received after he has procured process and is proceeding to attach or levy upon the property, would also probably be insufficient, whatever might be the effect of actual knowledge of the existence of a mortgage communicated to him at that time. "If we look to the reasons on which the exception has been founded, a notice cannot be sufficient under circumstances where it would operate as a fraud instead of preventing one. And to hold that a notice to a creditor may be effectual when it is not given until he has procured his process and is about to attach the property, would most effectually encourage fraud. In fact, if notice by the debtor to the sheriff were held sufficient, it would almost render nugatory the statute requiring mortgages of personal property to be recorded; for if the mortgagee could depend upon the custody, care, and diligence of the mortgagor, it would not be necessary to record any such mortgage. It would only be necessary, when any one came to attach, that notice should be given."²

A mortgage of property in possession of the mortgagor takes precedence of a prior attachment, although the mortgagee knew at the time he took the mortgage that the property had once been attached, but had no notice that the attachment was still subsisting. Finding the property in the possession of the debtor, he may well have presumed that the attachment had been dissolved.³

312. Notice to a subsequent purchaser or mortgagee before the completion of the sale or mortgage of an unrecorded mortgage is conclusive evidence of *mala fides* on his part, so that his title will be subject to the equitable rights of the holder of such unrecorded mortgage.⁴

¹ *Stowe v. Meserve*, 13 N. H. 46; *McCarthy v. Grace*, 23 Minn. 182; *McCalla*, 25 Iowa, 464; *Miller v. Bryan*, 3 Iowa, 58; *Crawford v. Burton*, 6 Iowa, 476; *McGavran v. Haupt*, 9 Iowa, 83; *Campbell v. Leonard*, 11 Iowa, 489; *Kuhn v. Graves*, 9 Iowa, 303; *Torbert v. Hayden*, 11 Iowa, 435; *Fromme v. Jones*, 13 Iowa, 474; *Bray v. Flickinger*, 69 Iowa, 167. *Michigan*: *Doyle v. Stevens*, 4 Mich. 87; *Wetherell v. Spencer*, 3 Mich.

² *Per Parker, C. J.*, in *Stowe v. Meserve*, *supra*. See, however, *Brown v. Smith*, 55 Iowa, 31; 14 N. W. Rep. 310.

³ *Carpenter v. Cummings*, 40 N. H. 158.

⁴ *Alabama*: *Smith v. Zurcher*, 9 Ala. 208; *Boyd v. Beck*, 29 Ala. 703; *Steele v. Adams*, 21 Ala. 534. *Iowa*: *Allen v.*

Under this rule it does not matter that the prior mortgage of which there is actual notice is defective and voidable as to *bonâ fide* purchasers. The notice charges the subsequent purchaser with knowledge of all the facts at that time existing relative to the mortgage, and he stands at best in no better position than his vendor; and cannot avoid the mortgage unless his vendor could. The question in such case would be, whether he fraudulently purchased the property knowing the rights of the prior mortgagee, and designing by trick and cunning to defraud him of them.¹

A prior mortgagee, who registers his mortgage after a subsequent mortgage is made by the mortgagor, but before the latter is registered, is entitled to priority notwithstanding he had notice of the latter mortgage at the time of recording his own.²

Of course if the prior mortgagee has by his acts or declarations

123; *Paulus v. Nunn*, 48 Mich. 190; 12 N. W. Rep. 40. **New Hampshire**: *Gooding v. Riley*, 50 N. H. 400; *Patten v. Moore*, 32 N. H. 382; *Clark v. Tarbell*, 57 N. H. 328; *Tucker v. Tilton*, 55 N. H. 223; *Low v. Pettengill*, 12 N. H. 337, 339; *Stowe v. Meserve*, 13 N. H. 46. **New Jersey**: *National Bank v. Sprague*, 21 N. J. Eq. 530; *Williamson v. N. J. Southern R. R. Co.* 26 N. J. Eq. 398. **New York**: *Shuler v. Boutwell*, 18 Hun, 171; *Gregory v. Thomas*, 20 Wend. 17; *Sanger v. Eastwood*, 19 Ib. 514; *Gould v. Marsh*, 4 T. & C. 128; *Tiffany v. Warren*, 37 Barb. 571; *Harris v. Norton*, 16 Barb. 264; *Lewis v. Palmer*, 28 N. Y. 271, 277; *Hill v. Beebe*, 13 N. Y. 556; *Meech v. Patchin*, 14 N. Y. 71; *Gildersleeve v. Landon*, 73 N. Y. 609. **Ohio**: *Paine v. Mason*, 7 Ohio St. 198; *Day v. Munson*, 14 Ib. 488; *Simons v. Pierce*, 16 Ib. 215; *Houk v. Condon*, 40 Ohio St. 569. **Other States**: *Hudson v. Warner*, 2 Har. & G. (Md.) 415; *Coble v. Nonemaker*, 78 Pa. St. 501; *Wright v. Bircher*, 5 Mo. App. 322; *S. C.* 12 Cent. L. J. 44.

In **Colorado** it is provided by statute that a person who buys or otherwise obtains an interest in any personal property, with actual notice of an unrecorded mortgage upon it, shall be deemed to have bought or obtained such interest subject

to the mortgage, the same as if it had been duly recorded. Gen. Laws 1877, p. 124, § 133.

In *Gooding v. Riley*, *supra*, Bellows, C. J., said: "The doctrine which forbids a subsequent purchaser with notice setting up such a defect to defeat a prior conveyance stands upon the ground that such purchase is to be regarded as made in bad faith, and with the purpose to defeat a prior equitable right, and therefore, in law, fraudulent; and to allow such prior right to be defeated in that way would be using a statute made to prevent fraud as an instrument for the protection of fraud. This doctrine originated in equity, but is now well established at law both in this country and in England. It is a salutary doctrine, and accords with the soundest principles of morality and public policy, which must regard as bad faith and a legal fraud an attempt to aid a grantor in defeating a conveyance fairly made by him, by obtaining a subsequent conveyance of the same land, having knowledge of the prior grant."

¹ *Patten v. Moore*, *supra*. See, however, *Hill v. Gilman*, 39 N. H. 88.

² *Copeland v. Bennet*, 10 Yerg. (Tenn.) 355.

led a purchaser to believe that his incumbrance has been removed, he cannot sustain his mortgage as against such purchaser.¹

But one who has purchased personal property in good faith, without notice of a prior unrecorded mortgage upon it, can convey a good title to any one else, even though the second purchaser had actual knowledge of the prior mortgage.²

313. A purchaser who has paid nothing is not entitled to protection as a purchaser in good faith within the terms of a statute making an unrecorded mortgage void against "subsequent purchasers or mortgagees in good faith." The object of the statute is to protect those who have acquired rights under circumstances which would render them liable to be defrauded unless so protected; but a purchaser who has paid nothing cannot be so defrauded. One can be protected as a *bonâ fide* purchaser only to the extent of his payments made before he received such notice as should have prevented him from making further payments.³ Moreover, the purchase money must be actually paid, and not merely secured to be paid, before any notice is received, to entitle him to the position of a *bonâ fide* purchaser, for otherwise he would not be hurt by the prior mortgage.⁴

In some states a mortgage given merely as collateral security for a past indebtedness does not constitute the mortgagee a purchaser for value.⁵

314. But under statutes making unrecorded mortgages void against persons other than the parties to them, such as those of Massachusetts, Maine, and Missouri, such mortgages have no validity against subsequent purchasers and mortgagees, although they have actual notice of the mortgages;⁶ and such

¹ *Hudson v. Warner*, 2 Har. & G. (Md.) 415; *Ransom v. Schmela*, 15 Rep. 19.

² *Tylor v. Safford*, 31 Kans. 608.

³ *Kohl v. Lynn*, 34 Mich. 360; *Stone v. Welling*, 14 Mich. 514, 525.

⁴ *Patten v. Moore*, 32 N. N. 382; *Harris v. Norton*, 16 Barb. (N. Y.) 264; *Merrill v. Dawson*, Hemp. 563; *Cummings v. Tovey*, 39 Iowa, 195; *Kessey v. McHenry*, 54 Iowa, 187; *S. C.* 6 N. W. Rep. 262.

⁵ *People's Savings Bank v. Bates* (U. S.), 7 Sup. Ct. Rep. 679; *Boxheimer v.*

Gunn, 24 Mich. 372, 379; *Overstreet v. Manning*, 67 Tex. 657; 4 S. W. Rep. 249.

⁶ *California*: *Gassner v. Patterson*, 23 Cal. 299. *Maine*: *Garland v. Plummer*, 72 Me. 397. *Massachusetts*: *Bingham v. Jordan*, 1 Allen, 373; *Travis v. Bishop*, 13 Met. 304. *Missouri*: *Rawlings v. Bean*, 80 Mo. 614; *Bevans v. Bolton*, 31 Mo. 437; *Wilson v. Milligan*, 75 Mo. 41. In the latter case the rule is stated with the qualification, "if the mortgage remains unrecorded an unreasonable length of

notice to a creditor would not debar him from taking such property by attachment or execution.¹ Neither is such a mortgage valid against an assignee in insolvency of the mortgagor;² or against an assignee under a voluntary assignment for the benefit of creditors.³ The assignee in the latter case could not be heard to say that he took possession of the goods as the agent of the mortgagee and not under the assignment, as such a relation would be inconsistent with his duty as assignee.⁴

There is a marked difference between such a statute and the usual form of statute relative to the recording of mortgages of real property. In both Maine and Massachusetts, actual notice of an unrecorded deed of real estate is by statute equivalent to registry. An unrecorded mortgage of personal property not delivered is not valid against any other person than the parties thereto; but an unrecorded mortgage of real property is valid as against persons having actual notice.⁵

315. In Illinois it was formerly held that a mortgage good as between the parties to it was good as to purchasers with notice, and that such purchasers could not be considered *bonâ fide* purchasers, and that they only acquired an equity of redemption in the property subject to the mortgage.⁶ But after considerable conflict in the decisions, it seems to be settled by the later cases that when possession of the mortgaged property remains with the

time." This qualification is made with a view to the statement of Judge Scott in *Bryson v. Penix*, 18 Mo. 13, that inasmuch as the statute prescribes no time within which the mortgage shall be recorded, the mortgagee is entitled to a reasonable time for that purpose. But a mortgagee is bound by notice of an agreement that the property should belong to the mortgagor's vendor until paid for. *Kingsland v. Drum*, 80 Mo. 646. **Wisconsin:** *Donaldson v. Johnson*, 2 Chand. 160.

¹ *Sheldon v. Conner*, 48 Me. 584; *Rich v. Roberts*, 48 Me. 548, overruling *Sawyer v. Pennell*, 19 Me. 167, so far as contrary; *Bevans v. Bolton*, 31 Mo. 437; *Bryson v. Penix*, *supra*; *Selking v. Hebel*, 1 Mo. App. 340. See § 287.

² *Hodgson v. Butts*, 3 Cranch 140; *Denny v. Lincoln*, 13 Met. (Mass.) 200;

Briggs v. Parkman, 2 Met. (Mass.) 258; *Chenyworth v. Daily*, 7 Ind. 284; *Matlock v. Straughn*, 21 Ind. 128.

³ *Lockwood v. Slevin*, 26 Ind. 124.

⁴ *Lockwood v. Slevin*, *supra*.

⁵ *Denny v. Lincoln*, 13 Met. (Mass.) 200, per Shaw, C. J.; *Sheldon v. Conner*, *supra*; *Gooding v. Riley*, 50 N. H. 400, 410, per Bellows, C. J.; *Rich v. Roberts*, *supra*.

⁶ *Craig v. Dimock*, 47 Ill. 308, 319; *Van Pelt v. Knight*, 19 Ill. 535; *Forest v. Tinkham*, 29 Ill. 141; *Porter v. Dement*, 35 Ill. 478. The authority of *Hathorn v. Lewis*, 22 Ill. 395, that one having actual notice of a mortgage and purchasing the property is not a *bonâ fide* purchaser, is considered much shaken, if not wholly overruled.

mortgagor, unless the mortgage is acknowledged, and entry thereof is made in the docket of the officer taking the acknowledgment, and the mortgage is recorded pursuant to the requirements of the statute, the mortgage will be void as to purchasers and creditors of the mortgagor acting in good faith, even with actual knowledge of the mortgage; and that actual knowledge is not inconsistent with good faith.¹

But one purchasing chattels with knowledge that they are subject to a mortgage, and in collusion with the mortgagor to cheat the mortgagee, acquires no title to them.²

316. In Indiana it is to be noticed that the statute relating to the recording of chattel mortgages differs from the statute of that state relating to the recording of mortgages of real estate, in that the want of record makes the mortgage absolutely void except as between the parties, while an unrecorded mortgage of real estate is made "fraudulent and void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration." Under the latter statute, one who has notice of an unrecorded instrument is not a purchaser or mortgagee in good faith; but under the statute relating to the recording of chattel mortgages the want of record makes the mortgage void as to all men except the parties, even though they have notice of the unrecorded mortgage.³ The failure to record the mortgage makes it void even as against an assignee of the mortgagor under a voluntary assignment for the benefit of creditors,⁴ or an assignee in bankruptcy,⁵ although such assignee have actual notice of the mortgage.

317. Notice to creditors. — Under a statute making an unrecorded mortgage of property remaining in the possession of the

¹ *Sage v. Browning*, 51 Ill. 217; *McDowell v. Stewart*, 83 Ib. 538; *Frank v. Miner*, 50 Ill. 444; *Lemen v. Robinson*, 59 Ib. 115; *People v. Hamilton*, 17 Bradw. 599. In *Colorado*, under a statute dispensing with the record of a mortgage as against persons having actual knowledge, it is held that the mortgage is not valid as against such persons unless it was acknowledged as provided by statute. *Crane v. Chandler*, 5 Colo. 21. See § 195.

² *Fuller v. Paige*, 26 Ill. 358. *Breese*,

J.: "We do not say that the mere knowledge of the existence of a mortgage unrecorded would make the purchase from the mortgagor a fraud in law, where there is no intent manifested by such purchaser to commit a fraud in fact by enabling the mortgagor to pocket the avails, and so cheat the mortgagee."

³ *Moore v. Young*, 4 Biss. 128; *Kennedy v. Shaw*, 38 Ind. 474.

⁴ *Lockwood v. Slevin*, 26 Ind. 124.

⁵ *Moore v. Young*, 4 Biss. 128.

mortgagor void against existing creditors or subsequent purchasers without notice, such a mortgage is valid against existing creditors who receive notice of the mortgage at any time before obtaining a lien or levy on such property. Actual notice is as effectual as constructive notice by record as against subsequent purchasers, and an attaching creditor stands in no better position.¹ That one may be a *bonâ fide* purchaser without notice, he must be without

¹ McGavran v. Haupt, 9 Iowa, 83; Allen v. McCalla, 25 Iowa, 464; Cragin v. Carmichael, 2 Dill. 519, note; Crooks v. Stuart, 2 McCrary, 13. In Iowa the statute in express terms provides that a mortgage not filed is invalid against existing creditors and subsequent purchasers *without notice*. The words *without notice* are held to apply to creditors as well as purchasers. To an argument at bar that such a construction of the statute would tend to enable parties to commit, or facilitate them in the perpetration of fraud, the court, in Allen v. McCalla, *supra*, reply that there is no soundness in it. "The filing of a mortgage for record and the recording thereof is but constructive notice of its existence; and if a party has notice of its existence otherwise than by its record, the full purpose of the statute is attained. Fraud cannot be perpetrated under cover of a notice to a party otherwise than by record, any more easily in degree or effect than when the notice is communicated by means of recording. Any distinction in this particular is imaginary, not real. In support of this, we might cite the decisions under the early English registration acts, as well as under certain of our state laws. The early English and some of our state statutes made no exception in terms as to purchasers, etc., with notice; but all conveyances, mortgages, etc., were declared to be invalid as to subsequent purchasers, etc., unless recorded; and yet nothing is better settled in England and in this country, than that a purchaser of a legal title will be liable to all equities of which he had actual or constructive notice at the time of the purchase; and a purchaser by deed duly reg-

istered will in England be restrained in equity from availing himself of his purchase when he had notice of a prior unregistered conveyance, although the statute does not use the words 'without notice;' and in this country it is held, both in law and in equity, that a conveyance, duly registered, passes no title whatever, when taken with a knowledge of the existence of a prior unregistered conveyance. . . . We refer to this doctrine for the purpose of showing the radical error of counsel, in supposing that fraud would be facilitated by holding the words 'without notice,' in our statute, to apply to creditors as well as to purchasers. For if the courts of equity, both in England and in this country, found it necessary, in order to prevent fraud, to go beyond the language of the statute, so as to apply it to parties having notice otherwise than by registration, it could hardly be contended that fraud would be facilitated by giving full force to the express language of our statute, which is in precise accord with those decisions. In other words, if courts of equity interpolate those words in the statute, where they are omitted, in order to prevent fraud, to give them force when used in the statute will not facilitate fraud. . . . It may be proper, though perhaps unnecessary, to add, that the different construction which obtains in Ohio, New York, Massachusetts, and other states, grows out of the different, not to say peculiar, language of the statutes of those states, and hence we do not deem it necessary to review the authorities from those states, cited and ably enforced by counsel in argument at bar."

notice of the rights and equities sought to be enforced at the time of the payment of the consideration.¹

An officer about to levy an attachment is bound by actual notice of a prior mortgage, whether he receives such notice before or after the writ was placed in his hands.²

An attachment levied after the execution of the mortgage, but without actual notice of it, creates a lien superior to the mortgage. Notice to a judgment creditor of an unrecorded mortgage, after he has made a valid attachment of the property, or levy upon it, though before he purchases the property at a sheriff's sale, is without effect. If a creditor having made an attachment or levy without notice of an unrecorded mortgage, is not protected from the effect of a subsequent notice, it would follow that a sale or mortgage not evidenced by a recorded instrument would be valid against all persons except subsequent purchasers without notice.³

318. Under the statutes of some states, notice of a mortgage not filed does not affect creditors, but does affect subsequent purchasers and mortgagees. Good faith is not required of creditors in order to enable them to avoid such a mortgage. This distinction is founded upon the terms of the statutes. Thus, in New York the statute declares that such a mortgage is "void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith." Subsequent purchasers and mortgagees are not protected unless they take their conveyances in good faith; and they cannot take them in good faith if they have actual knowledge of the existence of an antecedent mortgage.⁴ But as against creditors such a mortgage is declared void without qualification. And, therefore, mere knowledge on the part of a creditor that his debtor has executed a mortgage which has not been duly filed does not preclude him from availing himself of the objection that it is for this reason void.⁵ If, however, upon an execution sale, the sheriff sell ex-

¹ *Marsh v. Armstrong*, 20 Minn. 81. And see *Cummings v. Tovey*, 39 Iowa, 195; *Kessey v. McHenry*, 54 Iowa, 187.

² *Stewart v. Smith*, 60 Iowa, 275; *Young v. Walker*, 12 N. H. 502.

³ *Bacon v. Thompson*, 60 Iowa, 284; *Boothby v. Brown*, 40 Iowa, 104; *Hickok v. Buell*, 51 Iowa, 655; *Kessey v. Mc-*

Henry, *supra*, is overruled in *Bacon v. Thompson*, *supra*.

⁴ *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. (N. Y.) 484; *Tyler v. Strang*, 21 Ib. 198; *Tiffany v. Warren*, 37 Ib. 571; *Sayre v. Hewes*, 32 N. J. Eq. 652.

⁵ *Farmers' Loan & Trust Co. v. Hen-*

•pressly subject to such mortgage, the purchaser, though he be the judgment creditor, acquires only the equity of redemption.¹

The statute of New Jersey makes a similar distinction between creditors and subsequent purchasers and mortgagees.² Such is also the law in Ohio³ and Texas.⁴

drickson, 25 Barb. (N. Y.) 484; Stevens v. Buffalo & N. Y. City R. R. Co. 31 Barb. (N. Y.) 590.

¹ Barker v. Doty, 4 Alb. L. J. 63.

² Sayre v. Hewes, 32 N. J. Eq. 652, 656. "Purchasers or mortgagees," says Vice-Chancellor Van Fleet, "to be in a position to avail themselves of an omission by an antecedent mortgagee, must have acted without notice of the rights of the holder of the antecedent security; but not so with creditors. A creditor may know

that an antecedent mortgage has been given, yet, if it is not filed according to the requirement of the statute, and he obtains a judgment and procures a levy to be made, his lien, by force of the statute, is entitled to preference in payment." See, also, Williamson v. N. J. Southern R. R. Co. 29 N. J. Eq. 311, 336; S. C. 28 N. J. Eq. 277.

³ Houk v. Condon, 40 Ohio St. 569.

⁴ Brothers v. Mundell, 60 Tex. 240.

CHAPTER VIII.

FRAUDULENT MORTGAGES.

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| <p>I. Fraud arising from the mortgagor's continued possession without record, 319-332.</p> <p>II. Other frauds under the statute of frauds and at common law, 333-351.</p> <p>III. Trust assignments in the nature of mortgages, 352-355.</p> | <p>IV. Fraudulent preferences under bankrupt and insolvent laws, 356-366.</p> <p>V. Fraud in mortgages of consumable property, 367, 368.</p> <p>IV. Fraud arising from the mortgagor's possession after default, 369-378.</p> |
|---|---|

I. Fraud arising from the Mortgagor's Continued Possession without Record.

319. Whether an immediate delivery of possession is essential to the validity of an absolute sale of personal property is a question upon which there is some conflict of authority. It was formerly the doctrine in England,¹ and it continues to be the doctrine of many of the American courts,² that an absolute bill

¹ *Twyne's case*, 3 Coke, 80 b; *Wordall v. Smith*, 1 Camp. 332; *Edwards v. Harben*, 2 T. R. 587; *Steel v. Brown*, 1 Taunt. 381.

² **California**: So by statute. Laws 1850, p. 267; 1 Codes & Stats. 1876, § 8440; *Woods v. Bugbey*, 29 Cal. 466. In all other cases the question is one of fact.

Connecticut: *Osborne v. Tuller*, 14 Conn. 529; *Kirtland v. Snow*, 20 Conn. 23; *Lake v. Morris*, 30 Conn. 201; *Norton v. Doolittle*, 32 Conn. 405; *Hall v. Gaylor*, 37 Conn. 550; *Hatstat v. Blakeslee*, 41 Conn. 301. But whether there has been in fact such a retention of possession is a question for the jury. *Lake v. Morris*, *supra*.

Delaware: So by statute. *Taylor v. Richardson*, 4 Houst. 300.

Florida: *Smith v. Hines*, 10 Fla. 258.

Illinois: *Davis v. Ransom*, 18 Ill. 396;

Thornton v. Davenport, 1 Scam. 296; *Young v. Bradley*, 68 Ill. 553; *Ticknor v. McClelland*, 84 Ill. 471; *Allen v. Carr*, 85 Ill. 388; *Rozier v. Williams*, 92 Ill. 187.

Iowa: The Code makes a sale without delivery void unless the instrument be recorded; and the statute is strictly construed. *Prather v. Parker*, 24 Iowa, 26; *Boothby v. Brown*, 40 Iowa, 104; *Hesser v. Wilson*, 36 Iowa, 152.

Kentucky: *Bradley v. Buford*, *Sneed*, 12; *Morton v. Ragan*, 5 Bush, 334. The court has more than once expressed dissatisfaction with the rule. *Daniel v. Morrison*, 6 Dana, 182; *Enders v. Williams*, 1 Metc. 346, 352. The rule does not apply to sales of property not in a condition to be removed, such as growing crops. *Robbins v. Oldham*, 1 Duv. 28; *Cummins v. Griggs*, 2 Duv. 87; *Morton v. Ragan*, *supra*. Nor to purchasers or creditors with

of sale, which is to take effect immediately, is rendered fraudulent *per se* by leaving the property in possession of the vendor; although if such possession be consistent with the face of the deed of conveyance, it may be explained, and the sale may nevertheless be valid. The doctrine of fraud in law as applicable to the subject under discussion has been said to be merely a kind of rule of evidence presenting what facts shall be held to show conclusively the existence of fraud and creating a kind of estoppel *in pais*.¹

Where this doctrine prevails, the vendor's continued possession is fraudulent *per se* as to creditors of the vendor and purchasers from him, notwithstanding the sale may have been made in good faith;² and this would be the case although authority were given in terms by the instrument of sale that the vendor might remain in possession, for such possession is inconsistent with a sale.³

actual notice of such sale. *Vanmeter v. Estill*, 1 Ky. Law Reporter, 32; *S. C.* 12 Chicago L. N. 375. This rule does not embrace mortgages.

Missouri: So by statute of 1865. *Wagner's Stats.* 281, § 10; *Clafin v. Rosenberg*, 42 Mo. 439; *Lesem v. Herriford*, 44 Mo. 323; *Bishop v. O'Connell*, 56 Mo. 158; *Burgert v. Borchert*, 59 Mo. 80; *Franklin v. Gummersell*, 11 Cent. L. J. 132.

Oregon: *McCully v. Swackhamer*, 6 Oregon, 438; *Gen. Laws* 1872, p. 262, § 766.

Pennsylvania: *Dawes v. Cope*, 4 Binn. 258; *Babb v. Clemson*, 10 S. & R. 419; *Shaw v. Levy*, 17 S. & R. 99; *Clow v. Woods*, 5 S. & R. 275; *McKibbin v. Martin*, 64 Penn. St. 352, 356; *Bentz v. Rockey*, 69 Penn. St. 71; *Miller v. Garman*, *Ib.* 134; *Garman v. Cooper*, 72 Penn. St. 32.

Vermont: *Houston v. Howard*, 39 Vt. 54; *Daniels v. Nelson*, 41 Vt. 161.

¹ *Daniels v. Nelson, supra*.

² *Thompson v. Wilhite*, 81 Ill. 356; *Allen v. Carr*, 85 Ill. 388; *Lewis v. Swift*, 54 Ill. 436; *Powers v. Green*, 14 Ill. 386, and cases cited; *Burnell v. Robertson*, 5 Gilm. (Ill.) 282.

³ *Thornton v. Davenport*, 1 Scam. (Ill.) 296, 299; *Rhines v. Phelps*, 3 Gilm. (Ill.) 455, 464; *Greenebaum v. Wheeler*, 90 Ill. 296, 298; *Goodheart v. Johnson*, 88 Ill. 58, 62; *Barnet v. Fergus*, 51 Ill. 352, 355.

In regard to this doctrine of fraud *per se*, Mr. Bump, in his learned treatise upon *Fraudulent Conveyances*, pages 68-73, very justly says in substance that it is apt to work injustice; that the advantage of simplicity which it is supposed to possess does not exist in fact, as may be seen by a glance at the confused mass of authorities in which this easy guide to the detection of fraud has only led to an endless maze of disputation, and numerous modifications of the rule and exceptions to it. He further says that another objection to the rule is that it looks to the form rather than the substance of the transaction; that it is not founded in good policy; that it restricts trade and industry; that it sets up a fictitious standard of morals; and that the attempt to divide honesty into chapters, or to define morality by sections, is utterly unavailing. Citing for this *Stoddard v. Butler*, 20 Wend. (N. Y.) 507, 545, per Senator Dickinson; *Davis v. Turner*, 4 Gratt. (Va.) 422.

320. The modern English doctrine,¹ and that more generally adopted by the American courts,² is that possession by a vendor or mortgagor is at most only *prima facie* a badge of fraud; that the presumption arising from that circumstance may be rebutted by explanations showing the transaction to have been fair and honest; and that the question of fraud is always one of fact for a jury to determine. Mr. May, in his treatise upon Fraudulent Conveyances, after referring to the earlier English cases in which want of possession was regarded as conclusive evidence of fraud, says: "It by no means follows, though, that because there is no possession given a transfer is fraudulent; for those cases where the judges have said that if possession was not given it was fraudulent must be taken with reference to the circumstances of each case. The question of possession is one of

¹ Coote on Mortg. 4th ed. 426; Latimer v. Batson, 4 Barn. & Cress. 652; Martindale v. Booth, 3 B. & Ad. 498, 505; Steward v. Lombe, 1 Brod. & B. 506, 512; Arundell v. Phipps, 10 Ves. 139, 145; Kidd v. Rawlinson, 2 B. & P. 59; Leonard v. Baker, 1 M. & S. 251; Reed v. Blades, 5 Taunt. 212; Paget v. Perchard, 1 Esp. 205.

In Martindale v. Booth, *supra*, Parke, J., said: "I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of Buller, J., in Edwards v. Harben, 2 T. R. 587, has not been generally considered in subsequent cases to have that import. The want of delivery is only evidence that the transfer was colorable. . . . It may be a question for a jury whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not." Patteson, J., in the same case, said: "There is no sufficient authority for saying that the want of delivery of possession absolutely makes void a bill of sale of goods and chattels. It was held in Martin v. Podger, 2 Sir W. Bl. 701, that want of possession was a badge of fraud which ought to be left to the jury. Then, if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration."

² Alabama: Hobbs v. Bibb, 2 Stew. 54; Millard v. Hall, 24 Ala. 209, 219; Wyatt v. Stewart, 34 Ala. 716, 721; Mayer v. Clark, 40 Ala. 259; Mogg v. Benedicks, 49 Ala. 512; Crawford v. Kirksey, 55 Ala. 282; Sandlin v. Anderson, 3 So. Rep. 28. Arkansas: George v. Norris, 23 Ark. 121.

Georgia: Goodwyn v. Goodwyn, 20 Ga. 600.

Indiana: So by statute. Nutter v. Harris, 9 Ind. 88, 91; Kane v. Drake, 27 Ind. 29; Case v. Winship, 4 Blackf. 425.

Kansas: Denny v. Faulkner, 22 Kans. 89; and see Frankhouser v. Ellett, 22 Kans. 127, 146, per Brewer, J.; Wolfley v. Rising, 8 Kans. 297.

Louisiana: Keller v. Blanchard, 19 La. Ann. 53; Miltenberger v. Parker, 17 Ib. 254.

Maine: Cutter v. Copeland, 18 Me. 127; Fairfield Bridge Co. v. Nye, 60 Me. 372; McKee v. Garscelon, Ib. 165.

Maryland: Hudson v. Warner, 2 Har. & G. 415.

Massachusetts: Brooks v. Powers, 15 Mass. 244; Bartlett v. Williams, 1 Pick. 288; Ingalls v. Herrick, 108 Mass. 351.

Michigan: Jackson v. Dean, 1 Doug. 519; Bagg v. Jerome, 7 Mich. 145; Hatch v. Fowler, 28 Mich. 205.

Minnesota: So by statute. St. at Large,

much importance, but that is with a view to ascertain the good or bad faith of the transaction. In *Arundell v. Phipps*,¹ Lord Eldon said that the mere circumstance of the possession of chattels, however familiar it might be to say that it proves fraud, amounts to no more than that it is *prima facie* evidence of property in the man possessing until a title not fraudulent is shown under which that possession has followed; that every case from *Twyne's case* downwards supports that, and there was no occasion otherwise for the statute of King James. There is no sufficient authority for saying that the want of delivery of possession makes void a bill of sale of goods and chattels; it is *prima facie* evidence of a fraudulent intention, and if it be a badge of fraud only, in order to ascertain whether a deed be fraudulent or not, all the circumstances must be taken into consideration."²

692, § 15; *Blackman v. Wheaton*, 13 Minn. 326.

Mississippi: *Comstock v. Rayford*, 20 Miss. 369; *Hilliard v. Cagle*, 46 Miss. 309; *Ketchum v. Brennan*, 53 Miss. 596.

Nebraska: *Robison v. Uhl*, 6 Neb. 328.

New Hampshire: *Coburn v. Pickering*, 3 N. H. 415, 424; *Trask v. Bowers*, 4 N. H. 309; *Almy v. Wilbur*, 2 Woodb. & M. 371, 388. But the courts are prone to infer conclusively a secret trust from the vendor's possession, in connection with any confirming circumstances or agreements. *Coolidge v. Melvin*, 42 N. H. 510; *Lang v. Stockwell*, 55 N. H. 561; *Cutting v. Jackson*, 56 N. H. 253.

New Jersey: *Parr v. Brady*, 37 N. J. L. 201.

New York: *Hanford v. Artcher*, 4 Hill, 271; *Ball v. Loomis*, 29 N. Y. 412, 415; *Tilson v. Terwilliger*, 56 N. Y. 273; *Mitchell v. West*, 55 N. Y. 107; *May v. Walter*, 56 N. Y. 8; *Thompson v. Blanchard*, 4 N. Y. 306.

North Carolina: *Rea v. Alexander*, 5 Ired. L. 644.

Ohio: *Barr v. Hatch*, 3 Ohio, 527; *Hombeck v. Vanmetre*, 9 Ohio, 153.

Rhode Island: *Sarle v. Arnold*, 7 R. I. 582.

Tennessee: *Grubbs v. Greer*, 5 Cold.

160; *Maney v. Killough*, 7 Yerg. 440; *Carney v. Carney*, 7 Baxter, 284.

Texas: *Thornton v. Tandy*, 39 Tex. 544.

Virginia: *Davis v. Turner*, 4 Gratt. 422, 426; *Bird v. Wilkinson*, 4 Leigh, 266, 273; *Forkner v. Stuart*, 6 Gratt. 197; *Curd v. Miller*, 7 Gratt. 185.

Wisconsin: *Grant v. Lewis*, 14 Wis. 487.

¹ 10 Ves. 139, 145.

² P. 101. The same writer, stating his conclusions after examining the authorities, says: "The result of the authorities appears to establish this: that where in strict pursuance of the terms of the deed or agreement there is no actual possession given, such want of possession is not *per se* even evidence of fraud. In such a case the fraud against creditors must be looked for in the nature of the arrangement itself, and not in the way in which that arrangement is acted upon with regard to possession being taken; but in order to take advantage of this rule the subsequent acts must be consistent with the deed itself, and not with a parol agreement between the parties, for that is in the nature of a secret trust and is always viewed with the greatest suspicion."

321. But to speak of possession as being even *prima facie* evidence of fraud is incorrect. Possession is only a circumstance of more or less weight, to be considered in connection with other circumstances bearing upon the question of fraud. "There is much confusion among courts and law writers respecting possession in a grantor, vendor, or mortgagor, as evidence of fraud. Some judges loosely speak of it as being conclusive, and others as being only *primâ facie* evidence of fraud; but a careful examination of this branch of the law will show that neither of the views so expressed is correct." An examination of the cases decided in the federal courts leads to this conclusion: "If the cases cited prove anything, they prove this: that possession is not necessarily either conclusive or *primâ facie* evidence of fraud. To speak of possession as being in itself even *primâ facie* evidence of fraud is misleading and improper. . . . The correct formulation of the law relating to the subject under discussion, in view of the authorities considered, and of all the authorities when considered aright, is, possession is a link in a chain of circumstances, pertinent in proving fraud, having greater or less weight according to the circumstances of each case."¹

322. There is a marked distinction between an absolute conveyance and a mortgage which by its terms leaves the possession in the mortgagor.² "If the conveyance be conditional," says Buller, J.,³ "there the vendor's continuing in possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition; . . . and such possession comes within the rule, as accompanying and following the deed." The purpose of an absolute sale is usually to give the purchaser the immediate title and possession of the property, so that he can use it or deal with it as he will; but the purpose of a mortgage is security only; and therefore it is usual to provide in the deed that the mortgagor may retain possession of the property until default, for until this occurs it is

¹ Article in 11 Cent. L. J. 21 (July 9, 1880), by M. M. Cohn, Esq.

² United States v. Hooe, 3 Cranch, 73, per Marshall, C. J.

³ Edwards v. Harben, 2 T. R. 587, 596. The distinction between an absolute conveyance and a conveyance intended to

operate by way of mortgage is also recognized in *Martindale v. Booth*, 3 B. & Ad. 498; and see *Barrow v. Paxton*, 5 Johns. (N. Y.) 258; *Bissell v. Hopkins*, 3 Cow. (N. Y.) 166; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461.

uncertain whether the property will vest absolutely in the mortgagee, or whether he will need to take possession in order to avail himself of his security.

A mortgage differs from a pledge in that delivery and possession are not necessary; and the omission of them, where there has been an absolute sale, is regarded as inconsistent with the contract, and as raising a presumption of fraud. But the main object of a mortgage, as distinguished from a pledge, is to enable the debtor to retain the possession and enjoyment of the property so long as he fulfils the condition of the contract. Whatever danger of fraud there was at common law from the debtor's being allowed to retain the possession of mortgaged chattels has been removed by the registry laws, which make notice of the mortgage by record or filing equivalent to delivery of possession. But the adoption of these laws has not changed the effect of a mortgage at common law with or without a change of possession. If there be a change of possession, then no record or filing of the mortgage is necessary; but if there be no such change of possession, and no record or filing of the mortgage, the effect of the omission is the same now that it was at common law; there is, as is generally said, a presumption of fraud which may be removed by evidence that there was no fraud in fact.¹

323. That the mortgagor's possession is provided for by the terms of the deed is generally sufficient to overcome any presumption of fraud that might otherwise arise from such possession.²

Even possession by the mortgagor inconsistent with the terms of the deed is generally only *prima facie* evidence of fraud.³

Sales of chattels which are so situated that there can be no delivery at the time are within the exceptions to the general rule requiring delivery, and the sale is perfect if the vendee take possession within a reasonable time.⁴ Upon this principle an agree-

¹ Hull v. Carnley, 2 Duer (N. Y.), 99, 109.

² D'Wolf v. Harris, 4 Mason, 515; Barrow v. Paxton, 5 Johns. (N. Y.) 258; Hull v. Carnley, *supra*; Bissell v. Hopkins, 3 Cow. (N. Y.) 166; Letcher v. Norton, 4 Scam. (Ill.) 575; Stix v. Sadler, 109 Ind. 254; 9 N. E. Rep. 905.

³ Divver v. McLaughlin, 2 Wend. (N. Y.) 596.

⁴ Ricker v. Cross, 5 N. H. 570; Conard v. Atlantic Ins. Co. 1 Pet. 386, 449, per Story, J. See, however, Burnell v. Robertson, 5 Gilm. (Ill.) 282, commenting upon Ricker v. Cross, *supra*.

ment by a mortgagor and mortgagee of chattels that the latter shall receive them in payment of the debt, and that he may immediately take possession, is equivalent to actual delivery, if the chattels are situated at a distance, and the purchaser be not negligent in obtaining possession.¹

324. At common law the continuing possession of the mortgagor is at most only *prima facie* evidence of fraud, and may be explained. There never has been a time when the continuance in possession of a mortgagor until default in payment was deemed at common law conclusive evidence of fraud, rendering the security void as against creditors and purchasers.² It is now the general practice under the registry laws to provide that the mortgagor may remain in possession of the mortgaged property until default, and it is a settled rule that such possession does not render the mortgage void as against creditors.³

A temporary resumption of possession by a mortgagor is in like manner a badge of fraud, though open to explanation.⁴

But under the registration laws, if the mortgagor retain possession of the property without recording the mortgage, it is void in law, by express provision of the statutes.⁵

The retention of possession, however, by the vendor or mortgagor after a sale or mortgage has been made, does not affect its validity as between the parties. "We are not aware of any case," say the court in a recent case in California, "in which, independent of some statute, it has been held that a sale of personal property, and retention of possession thereof by the vendor or mortgagor, is void as between the parties thereto." The court accordingly held that a mortgage of shares of corporate stock was valid between the parties without a delivery of possession of the certificate of stock; and the fact that the property was not of a class upon which a chattel mortgage, as defined by statute, could be given, was declared to be immaterial. It could be mortgaged as between the parties.⁶

¹ Patrick v. Meserve, 18 N. H. 300.

² Fairbanks v. Bloomfield, 5 Duer (N. Y.), 434.

³ Fairbanks v. Bloomfield, *supra*.

⁴ Look v. Comstock, 15 Wend. (N. Y.) 244.

⁵ Piper v. Hilliard, 52 N. H. 209; Putnam v. Osgood, 51 N. H. 192.

⁶ Tregear v. Etiwanda Water Co. (Cal.) 18 Pac. Rep. 658.

325. It is a settled rule that irrespective of the registry laws the continuing possession of the mortgagor may be explained to be consistent with honesty in the transaction.¹ Thus, it is a sufficient explanation that a debtor, having mortgaged a mare and other chattels to secure an honest debt, retained possession of the mare with the creditor's consent, in order to settle and close the debtor's business as constable, he having no other horse; and that he also retained possession of the other articles to carry on his business.² In a case before the Superior Court of the city of New York,³ Hoffman, J., said: "It is too late to contend that in a mortgage of personal property the possession must, in all cases, be transferred to the mortgagee. It has been settled by repeated decisions of the Supreme Court of this state, and by other tribunals entitled to the highest consideration, especially the Supreme Court of the United States, that where there is a mort-

¹ **United States**: *Conard v. Atlantic Ins. Co.* 1 Pet. 386; *Almy v. Wilbur*, 2 Woodb. & M. 371, 387. **Massachusetts**: *Adams v. Wheeler*, 10 Pick. 199; *Macomber v. Parker*, 14 Pick. 497; *Shurtleff v. Willard*, 19 Pick. 202; *Homes v. Crane*, 2 Pick. 607. **New Hampshire**: *Ash v. Savage*, 5 N. H. 545; *Haven v. Low*, 2 N. H. 13; *North v. Crowell*, 11 N. H. 251; *Hoit v. Remick*, Ib. 285. **New York**: *Russell v. Butterfield*, 21 Wend. 300; *Thompson v. Blanchard*, 4 N. Y. 303; *Bissell v. Hopkins*, 3 Cow. 166; *Marsh v. Lawrence*, 4 Ib. 461; *Smith v. Acker*, 23 Wend. 653; *Murray v. Burtis*, 15 Ib. 212; *Cole v. White*, 26 Ib. 511; *Lewis v. Stevenson*, 2 Hall, 63; *Hull v. Carnley*, 2 Duer, 99; *Gardner v. Adams*, 12 Wend. 297; *Griswold v. Sheldon*, 4 N. Y. 581; *Butler v. Van Wyck*, 1 Hill, 438; *Fuller v. Acker*, Ib. 473; *Newell v. Warren*, 44 N. Y. 244. **Maine**: *Reed v. Jewett*, 5 Me. 96; *Smith v. Putney*, 18 Me. 87; *Cutter v. Copeland*, 18 Me. 127; *Lane v. Borland*, 14 Me. 77; *Gleason v. Drew*, 9 Me. 79; *Holbrook v. Baker*, 5 Me. 309; *Pierce v. Stevens*, 30 Me. 184; *Lunt v. Whitaker*, 10 Me. 310; *Googins v. Gilmore*, 47 Me. 9. **Kentucky**: *Ross v. Wilson*, 7 Bush, 29; *Head v. Ward*, 1 J. J. Marsh. 280; *Bucklin v. Thompson*, Ib. 223; *Vernon v. Morton*, 8 Dana, 247; *Lyons v. Field*, 17 B. Mon.

543; *Snyder v. Hitt*, 2 Dana, 204. **Alabama**: *Killough v. Steele*, 1 St. & P. 262; *Magee v. Carpenter*, 4 Ala. 469. **Other States**: *Runyon v. Groshon*, 12 N. J. Eq. 86; *Letcher v. Norton*, 4 Scam. (Ill.) 575; *Hughes v. Cory*, 20 Iowa, 399; *Hombeck v. Vanmetre*, 9 Ohio, 153; *Watson v. Williams*, 4 Blackf. 26; *Hankins v. Ingols*, Ib. 35; *Pyle v. Warren*, 2 Neb. 241; *Merrill v. Dawson*, Hemp. 563; *Volney Stamps v. Gilman*, 43 Miss. 456; *Bank of S. C. v. Gourdin*, Speers Eq. (S. C.) 439.

² *Bissell v. Hopkins*, *supra*.

³ *Lewis v. Stevenson*, *supra*. "Neither is the position to be sustained that the transfer is *ipso facto* void *per se* because the possession has been left with the mortgagor. If this were true, then there could be no such thing as a mortgage of chattels, for the very idea of a mortgage *ex vi termini* implies that the possession is to remain with the mortgagor. Still it is too strong to say that possession by itself implies *nothing*, for it is *primâ facie* evidence of ownership. It will throw upon a party who claims against it, or in spite of the possession, the necessity of showing the *bona fides* of the transaction, and will compel him to show why the possession was so left, and, moreover, to prove a proper consideration and an actual transfer."

gage of chattels the possession may, in many instances, remain with the mortgagor; especially in those cases where the possession must *necessarily* so remain, from the nature of the property mortgaged, and from the objects of the parties in making the transfer. If those objects be fair and proper, and for a full consideration, then there is no fraud in the transaction, and without fraud the mortgage is not void."

326. This is a mere rule of evidence calculated to shift the *onus probandi* from the creditor to the mortgagee.¹ If there has been no record or filing of the mortgage, and no actual and continued change of possession, before the mortgage can be upheld as a valid security the person asserting its validity must establish affirmatively that it was made in good faith and without any intent to defraud creditors or purchasers. It is not enough to show that it was given for a good and valid consideration. It is equally necessary to prove the absence of fraudulent intent.² But the same evidence which establishes the one fact may also be pertinent with reference to the other. The fact that a mortgage was executed upon a good and valid consideration tends to prove the absence of a fraudulent intent; and it is proper, on such evidence, to submit the question to the jury whether it was not also executed without intent to hinder or delay creditors. If there be no evidence that the mortgagor was indebted to any other person, and there is nothing in the case to show that the mortgage was executed for any other purpose than to secure a *bonâ fide* debt, the jury will be justified in finding in favor of the validity of the mortgage.³

327. It is a question of fact for the jury whether a chattel mortgage is fraudulent as to creditors by reason of the mortgagor's continued possession;⁴ and the jury having decided on the evidence before them against the alleged fraud in a mortgage, the

¹ Runyon v. Groshon, 12 N. J. Eq. 86; Putney, 18 Me. 87; Patten v. Smith, 4 Conn. 450; Hull v. Carnley, 2 Duer (N. Y.), 99; Butler v. Van Wyck, 1 Hill (N. Y.), 438; Fuller v. Acker, Ib. 473; Swift v. Hart, 12 Barb. (N. Y.) 530; Brunswick v. McClay, 7 Neb. 137; Maney v. Kil-lough, 7 Yerg. (Tenn.) 440.

² Groat v. Rees, 20 Barb. (N. Y.) 26; Randall v. Parker, 3 Sandf. (N. Y.) 69.

³ Groat v. Rees, *supra*.

⁴ Rowley v. Rice, 11 Met. (Mass.) 333; Cutter v. Copeland, 18 Me. 127; Smith v.

court will not, except in very glaring cases, disturb their verdict and grant a new trial.¹

328. This general rule, however, does not prevail in Pennsylvania and Illinois. In the former state an absolute delivery is essential to a mortgage of chattels, and a statement upon the face of the mortgage that the mortgagor may retain possession is not sufficient to make it valid, but it will be regarded as fraudulent *per se*.² If, however, the mortgage be of property of which a change of possession is impossible, it may be good without such change, for the law will not require that which is impossible. Thus a lessee of land upon which he has erected buildings under a lease which restrains him from assigning his interest under the lease and from removing the buildings, but provides for the payment to him of the money value of the improvements upon the termination of the lease, may mortgage the improvements without delivering possession, because such a delivery is impracticable.³ A mortgage of growing crops falls within the same principle.⁴

In Illinois possession retained by the mortgagor makes the mortgage fraudulent *per se*, unless the retaining of possession be consistent with the terms of the mortgage;⁵ and by this is meant that the right of possession must be given by the very terms of the mortgage;⁶ or must arise by necessary implication from those terms; as where a mortgage provides that if default be made, or the mortgagor shall attempt to sell the property, or the mortgagee shall be in danger of losing his security, the latter may enter and take possession of the mortgaged property.⁷

At common law all sales and pledges of personal property were void as to third parties, unless possession accompanied and went

¹ *Googins v. Gilmore*, 47 Me. 9; *Smith v. Smith*, 24 Me. 555; *Swift v. Hart*, 12 Barb. (N. Y.) 530; *Butler v. Miller*, 1 N. Y. 496; *Bishop v. Cook*, 13 Barb. (N. Y.) 326; *Smith v. Post*, 3 T. & C. (N. Y.) 647; *Oliver v. Eaton*, 7 Mich. 108; *Hunter v. Corbett*, Up. Can. 7 Q. B. 75.

² *Clow v. Woods*, 5 S. & R. 275; *Welsh v. Bekey*, 1 Penn. 57.

³ *Luckenbach v. Brickenstein*, 5 Watts & S. (Penn.) 145.

⁴ *Fry v. Miller*, 45 Penn. St. 441.

⁵ *Thornton v. Davenport*, 1 Scam. (Ill.) 296, 298.

⁶ *Thornton v. Davenport*, *supra*; *Kitchell v. Bratton*, 1 Scam. (Ill.) 300; *Rhines v. Phelps*, 3 Gilm. (Ill.) 455, 464; *Reed v. Eames*, 19 Ill. 594, 596; *Thompson v. Yeck*, 21 Ill. 73, 74; *Constant v. Matteson*, 22 Ill. 546, 558; *Cass v. Perkins*, 23 Ill. 382; *Funk v. Staats*, 24 Ill. 632; *Reese v. Mitchell*, 41 Ill. 365, 369; *Burnham v. Muller*, 61 Ill. 453.

⁷ *Lechter v. Norton*, 4 Scam. (Ill.) 575; *Babcock v. McFarland*, 43 Ill. 381.

with the title or to the pledgee; and where the vendor or pledgor retained the possession, the transaction was held in this state to be fraudulent *per se*, and incapable of explanation. Legislation in this state has altered the common law in so far, and only so far, as to permit the mortgagor to retain possession of the mortgaged property, where it is so provided in the instrument itself, when properly executed and acknowledged, by having a proper entry made by the justice of the peace in his docket, and by having it duly recorded. But if either of these requirements is wanting, while the mortgage may be binding between the parties, it is void as to purchasers and creditors of the mortgagor.¹

The recording of a chattel mortgage is not equivalent to possession in the mortgagee for the purpose of giving validity to the mortgage, and does not take away the necessity that the mortgagor be authorized by the very terms of the mortgage, or by necessary implication therefrom, to retain possession of the property, in order to render the mortgage a valid security as against third persons while he does so retain possession.²

To permit the mortgaged property to remain in possession of the mortgagor contrary to the terms of the mortgage is *per se* fraudulent, and admits of no explanation.³

329. Under the registry laws the filing or recording of a mortgage has the same effect as a delivery of the property in relieving the mortgagee of the *onus* of proving the honesty and good faith of the transaction. Either of these acts is sufficient to compel any one assailing the mortgage to prove affirmatively that it is fraudulent in fact.⁴ This is the general and prevailing rule.

This view is fully expressed by the Supreme Court of Kansas

¹ Porter v. Dement, 35 Ill. 478, 479; Frank v. Miner, 50 Ill. 444, 447; Greenebaum v. Wheeler, 90 Ill. 296; Hammers v. Dole, 61 Ill. 307, 310; Koplin v. Anderson, 88 Ill. 120, 124.

² Kitchell v. Bratton, 1 Scam. (Ill.) 300, 302, 303; Frank v. Miner, *supra*; Hammers v. Dole, *supra*; Greenebaum v. Wheeler, 90 Ill. 296, 298; Read v. Wilson, 22 Ill. 377, 380. Under R. S. 1845, a chattel mortgage may provide for the mortgagor's retaining possession of the mortgaged property for the period of two years, though the indebtedness secured

mature before that time. Cook v. Thayer, 11 Ill. 617; Read v. Eames, 19 Ill. 594, 595; Burnham v. Muller, 61 Ill. 453, 455. But under R. S. 1874 (ch. 95, § 4), the mortgage cannot provide that the mortgagor retain possession longer than two years, nor longer than until the maturity of the debt. Greenebaum v. Wheeler, *supra*.

³ Funk v. Staats, 24 Ill. 632.

⁴ See authorities cited in § 236, and Cotton v. Marsh, 3 Wis. 221; Bond v. Seymour, 1 Chand. (Wis.) 40.

in a recent case. Mr. Justice Brewer, speaking for the court, says: "There is nothing inherently vicious or against public policy in a mortgage. The right to mortgage is an incident to ownership. As a man may sell, so may he mortgage his personal property. Possession is not an essential element of title. A man may own property in another's possession. This is universally recognized in cases of loan, agency, and bailment; and the owner, in such cases, does not forfeit his title, or the right to assert and protect it even against third parties, by the mere fact of non-possession. If an owner may surrender his possession without losing title, why may not one acquire a good title without acquiring possession? Must the origin of title be accompanied by possession to make it perfect against third parties? There seems to be no sufficient reason therefor. A failure to deliver possession may be evidence tending to show no sale, or a lack of good faith; but as a delivery of possession is not essential to a transfer of title, a want of it is not conclusive evidence that there was no sale. A sale or mortgage is good *inter partes* without delivery of possession; so the authorities agree. If it is void as against creditors, it should be because some wrong is thereby done to them; but if the transaction is in good faith and they have notice of it, wherein are they wronged? If they claim that they are wronged, ought they not to prove the fact?"¹

¹ Frankhouser v. Ellett, 22 Kans. 127, 146. The learned judge further says: "A mortgage is a lien. The grantor does not purport to transfer his entire interest. He retains all not necessary to perfect the security. Possession may be of little benefit to the grantee, but of great benefit to the grantor. Why should he, after notice is given to the world of what has been done, be compelled to surrender that which is of so much benefit? A mortgage differs from a pledge, in that possession is necessary to perfect the latter and not the former. If possession is not necessary, why should a lack of it be held a wrong? Why should that which is right in and of itself be considered evidence of wrong? But it may be said that third parties, presuming title from possession, may be misled, to their prejudice. But with notice they cannot be misled. Registration is notice. Again,

it is said that such a transaction may be used as a cover for wrong. So may almost any transaction. A delivery of possession is not conclusive against wrong. Why should a legitimate transaction be condemned because improper use may be made of it? But the statute concerning sales says a failure to deliver possession is *prima facie* evidence of wrong as against creditors. True; but in sales there is no registration, and therefore no notice. In mortgages there are registration and notice. Again, the statute impliedly grants the right to stipulate for a retention of possession by the mortgagor. Can that which the legislature authorizes to be done be construed to be evidence of wrong? Can an act done in pursuance of law be adjudged fraudulent *per se*, or even evidence of fraud?

"Briefly, then, we hold that the statute

But in New York,¹ Nebraska,² Minnesota,³ and perhaps one or two other states, although the mortgage be duly recorded, a legal presumption of fraud arises from the continued possession of the property by the mortgagor, which can only be overcome by evidence that the mortgage was made in good faith, and without intent to defraud creditors. In these states the statutes providing for filing or recording chattel mortgages are not construed to make the recording or filing of them legally equivalent to actual delivery and continued change of possession. On the contrary, these statutes are held not to repeal the statute concerning fraudulent conveyances. They only add another to the grounds on which a mortgage of personal chattels may be declared void.⁴ Continuance of possession in the mortgagor is regarded as affording the highest presumption of fraudulent intent, amounting to conclusive proof, unless it be rebutted by evidence showing affirmatively the good faith of the transaction. Guilt and not innocence is presumed, and the burden of proof of that innocence is thrown wholly upon the party claiming under the mortgage.⁵

330. If the mortgaged property be exempt from attachment, there can be no presumption of fraud from the mortgagor's possession. He can have no possible motive for putting property under cover of a mortgage, when it is already protected by statute from every demand.⁶

331. A clause authorizing the mortgagor to retain posses-

authorizes a stipulation in a chattel mortgage for a retention of possession by the mortgagor, and that a possession retained in accordance with the terms of such mortgage is not, when the mortgage is duly filed, *per se* fraudulent, or even *prima facie* evidence of fraud as against creditors or subsequent purchasers."

¹ *Smith v. Acker*, 23 Wend. 653; *Dutcher v. Swartwood*, 15 Hun. 31.

² *Brunswick v. McClay*, 7 Neb. 137; *Pyle v. Warren*, 2 Neb. 241; *Bullis v. Drake*, 20 Neb. 167; *Marsh v. Burley*, 13 Neb. 261; *Severance v. Leavitt*, 16 Neb. 439; G. S. ch. 25, §§ 11, 14, 15.

³ *Horton v. Williams*, 21 Minn. 187;

Braley v. Byrnes, 25 Minn. 297; *Bannon v. Bowler*, 34 Minn. 416.

⁴ *Wood v. Lowry*, 17 Wend. (N. Y.) 492, 496.

⁵ *Smith v. Acker*, 23 Wend. (N. Y.) 653, 673. See § 236.

One cannot forbear to remark that the statutes leading to this result are bad, and that the interpretation of them by the court is entitled to no commendation.

⁶ *Patten v. Smith*, 4 Conn. 450; *Foster v. McGregor*, 11 Vt. 595; *Prout v. Vaughn*, 52 Vt. 451; *S. C.* 23 Alb. L. J. 97; *Vaughan v. Thompson*, 17 Ill. 78; *Derby v. Weyrich*, 8 Neb. 174.

sion until the mortgagee deems himself insecure does not render the instrument void if executed in good faith.¹ A deed of trust or mortgage is not invalidated by reason of a stipulation that the mortgagor or trustee shall retain possession until the mortgagee desires to take possession or request that the property may be sold.² Nor is a mortgage invalidated by a provision that the property shall be sold before default if the mortgagor desires it.³

332. Waiver of invalidity. — The right of a purchaser of goods to contest the validity of a prior mortgage on account of the mortgagor's continued possession is one simply personal to such purchaser. He may waive this right if he choose; and in a suit by him against his vendor for fraud in concealing the existence of the mortgage, the latter cannot claim that the purchaser might have successfully contended against the mortgagee's demand for the goods.⁴

II. *Other Frauds under the Statute of Frauds and at Common Law.*

333. The statute of 13 Elizabeth, perpetuated by 29 Elizabeth,⁵ and in this country either adopted as a part of the common law or substantially reenacted, for avoiding fraudulent conveyances devised, "to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions," etc., declared and enacted that every conveyance for such purpose should be deemed, as against such creditors and others, to be utterly void and of none effect. But the act excepts from its operation transactions *bonâ fide* and founded upon a good consideration. Under this statute, one who takes a mortgage of property, with knowledge of a fraudulent design of the mortgagor thereby to defeat or delay his creditors, is in law charged with a participation in the fraud, although he may pay a full consideration and take immediate possession. The transaction is then *mala fide*, and the mortgage to him utterly void and of no effect as to creditors.⁶

¹ Frost v. Mott, 34 N. Y. 253.

⁵ 13 Eliz. ch. 5.

² Brock v. Headen, 13 Ala. 370; Dubose v. Dubose, 7 Ala. 235.

⁶ Twyne's case, 3 Coke, 80 a; Robinson v. Holt, 39 N. H. 557; David v. Birchard, 53 Wis. 492.

³ Sipe v. Earman, 26 Gratt. (Va.) 563.

⁴ Rust v. Morse, 2 Hill (N. Y.), 655.

334. A mortgage which is executed not alone to secure an indebtedness to the mortgagee, but to protect the property of the mortgagor, and to hinder and delay his creditors, this fact being known at the time by the mortgagee, is fraudulent as to creditors.¹ It is not necessarily fraudulent because its effect is to hinder and delay creditors;² it must be shown that the mortgage was a fraudulent contrivance for that purpose, and that the mortgagee was privy to the fraudulent design.³ A debtor has an undoubted right to secure his creditor by mortgage, and notwithstanding the ultimate effect of this may be to delay other creditors, it will be valid if made in good faith solely for security.⁴

If the mortgage be given with the intent to hinder and delay creditors, it is fraudulent, though it be given to secure an honest debt. An honest debt is essential to the validity of a mortgage; but an honest purpose in securing such debt is equally essential.⁵

335. Fraud on the part of the mortgagor does not affect the mortgagee unless he was a party or privy to it, and received the mortgage with the intent to hinder, delay, or defraud the creditors of the mortgagor, or had notice of the fraudulent intent of the mortgagor.⁶ Both parties must participate in the fraudulent intent to make the mortgage void.⁷

To affect the mortgagee with knowledge of an intent to hinder

¹ *Strohm v. Hayes*, 70 Ill. 41; *Hansen v. Dennison*, 7 Bradw. (Ill.) 73; *Crapster v. Williams*, 21 Kans. 109; *Herkelrath v. Stookey*, 63 Ill. 486; *Solberg v. Peterson*, 27 Minn. 431; *Rencher v. Wynne*, 86 N. C. 268; *Burley v. Marsh*, 11 Neb. 291; *Moline Wagon Co. v. Rummell*, 2 McCrary, 307; *Robinson v. Walsh*, 54 Mich. 506; *Nasse v. Algermissen*, 25 Mo. App. 186; *Galpin v. Galpin* (Iowa), 38 N. W. Rep. 156; *Carr v. Ryan*, 2 Wyo. 130; *Winstead v. Hulme*, 32 Kans. 568.

² *Cornell v. Pierson*, 8 N. J. Eq. 478.

³ *Hempstead v. Johnston*, 18 Ark. 123; *Adams v. Niemann*, 46 Mich. 135.

⁴ *Francis v. Rankin*, 84 Ill. 169; *Thorn-ton v. Davenport*, 1 Scam. (Ill.) 296.

⁵ *David v. Birchard*, 53 Wis. 492; *Piling v. Otis*, 13 Wis. 495; *Smith v. Hardy*, 36 Wis. 417.

⁶ *New York: Smith v. Post*, 1 Hun,

516; *Murphy v. Moore*, 23 Hun, 95. Illinois: *Prior v. White*, 12 Ill. 261; *Hes-sing v. McCloskey*, 37 Ill. 341, 351; *Rust v. Mansfield*, 25 Ill. 336, 338; *Myers v. Kinzie*, 26 Ill. 36; *Miner v. Phillips*, 42 Ill. 123. Arkansas: *Cornish v. Dews*, 18 Ark. 172. Alabama: *Stover v. Herring-ton*, 7 Ala. 142; *Price v. Masterson*, 35 Ala. 483. Iowa: *Fifield v. Gaston*, 12 Iowa, 218; *Headington v. Langland*, 65 Iowa, 276; *Frost v. Rosecrans*, 66 Iowa, 405. Maine: *McLarren v. Thompson*, 40 Me. 284. Nebraska: *Burley v. Marsh*, 11 Neb. 291. Michigan: *Andrews v. Fill-more*, 46 Mich. 315. Minnesota: *Fore-paugh v. Pryor*, 15 Rep. 113. Missouri: *Hausmann v. Hope*, 20 Mo. App. 193; *Shelley v. Boothe*, 73 Mo. 74; *Holmes v. Braidwood*, 82 Mo. 610.

⁷ *Meixsell v. Williamson*, 35 Ill. 529; *Herkelrath v. Stookey*, *supra*.

and delay creditors, it need not be shown that he had actual or positive information or notice of such intent; but his participation in such intent may be inferred from his knowledge of facts and circumstances sufficient to raise such suspicions as should put him upon inquiry.¹

336. A fraudulent intent and knowledge on the part of one of two mortgagees to whom a mortgage is made to secure separate and distinct debts does not affect the rights of the other. He stands in the same position as if he had taken a separate mortgage to himself. There are virtually two mortgagees instead of one, with distinct interests; and the fraud which vitiates the mortgage relates to the substance and subject matter of the mortgage, and not to the parties. The fraud of one mortgagee taints the mortgage debt secured to him, and does not affect the mortgage debt secured to the other. Although two persons are secured separately in one mortgage, it must be considered as a transfer, separate and distinct, which enables each one to hold the property independently of the other, in proportion to the debt secured.²

An intentional fraud in the maker of a trust deed as to some of the beneficiaries whose claims are provided for, but not participated in by the other beneficiaries whose debts are valid, renders the deed void as to so much of the debt secured as is covered by the fraudulent purpose of the maker, and concurred in by the beneficiaries whose claims are false and fictitious.³

337. Fraud, like any fact, may be proved by circumstances. The rule that fraud must be proved and not inferred does not mean that fraud can be proved only by positive evidence, but that it cannot be established by circumstances that merely raise a suspicion.⁴ When the circumstances are so strong as to produce conviction of the truth of the charge, although there may

¹ *David v. Birchard*, 53 Wis. 492; *Avery v. Johann*, 27 Wis. 246, 251; *Atwood v. Impson*, 20 N. J. Eq. 150; *Richardson v. Coddington*, 45 Mich. 338; *S. C.* 12 N. W. Rep. 886.

² *Smith v. Post*, 1 Hun (N. Y.), 516. See, however, *Adams v. Niemann*, 46 Mich. 135, which seems to hold otherwise;

but the case is briefly and imperfectly reported.

³ *Troustine v. Lask*, 4 Bax. (Tenn.) 162.

⁴ *Bryant v. Simoneau*, 51 Ill. 324; *Bullock v. Narrott*, 49 Ill. 62; *Rothgerber v. Gough*, 52 Ill. 436; *Sparks v. Mack*, 31 Ark. 666, 672, per Walker, J.

remain some doubt, it will be considered as proved. Thus, in determining the fairness of a mortgage made by one who had obtained the mortgaged goods from another on credit, by false and fraudulent representations in regard to his responsibility, the jury may properly consider the circumstances that the mortgagee took his mortgage for a larger sum than was actually due him, and knew at the time he took the mortgage that the mortgagor was insolvent at the time he obtained the goods on credit, and that they were not paid for.¹ The fact that the mortgaged property very largely exceeds in value the amount of the debt secured may be considered as a circumstance tending to show that the creditor's intention, in taking the mortgage, was not in good faith to secure himself, but to hinder, delay, or defraud other creditors.²

337 a. The fact that a mortgage is withheld from record, and finally recorded just before the mortgagor makes a general assignment for the benefit of his creditors, is a circumstance to be considered, with other circumstances, as indicating fraud.³ The withholding of a mortgage from record is a matter open to explanation. But if it appears that the mortgage was withheld from record in order to enable the mortgagor to remain in possession of a stock of goods, and to deal with it as his own, and thereby aid him in making purchases of new goods on a false credit, the mortgagee will be estopped, as against parties so misled, from asserting the existence of a lien under his mortgage.⁴

But no one can complain of a failure to file a chattel mortgage for any length of time, unless after its date, and before its filing, or before the mortgagee takes possession under it, the creditor assailing it has dealt with the mortgagor as he would not have dealt had the mortgage been recorded.⁵

¹ *Strauss v. Kranert*, 56 Ill. 254.

² *Olmstead v. Mattison*, 45 Mich. 617; *Ganong v. Green* (Mich.), 38 N. W. Rep. 661.

³ *Jaffrey v. Brown*, 29 Fed. Rep. 476, 482; *Magovern v. Richard* (S. C.), 3 S. E. Rep. 340.

⁴ *Lyon v. Council Bluffs Sav. Bank*, 29 Fed. Rep. 566, 576; *Crooks v. Stuart*, 2

McCrary, 13, 15; 7 Fed. Rep. 800; *Simon v. Openheimer*, 20 Fed. Rep. 553; *Rumsey v. Town*, Ib. 558; *Standard Paper Co. v. Guenther*, 67 Wis. 101.

⁵ *Johnson v. Stellwagen* (Mich.), 34 N. W. Rep. 252, per Campbell, C. J.; *Waite v. Mathews*, 50 Mich. 392; 15 N. W. Rep. 524.

The fact that a mortgage duly filed was dated back does not affect its validity.¹

338. Circumstances clearly indicating an intention to delay creditors, by placing a mortgage upon the debtor's property, constitute a legal fraud, although neither of the parties to the mortgage had the intention of perpetrating a legal fraud, and although they may have intended to act for the benefit of all the creditors of the mortgagor.² Such facts and circumstances as the following are sufficient to overcome a denial of the mortgagee of a fraudulent motive on his part: ³ "The transaction was between near relatives, — father and son; the transfer was in gross, and of all the visible property of the mortgagor; no account of stock was taken; no change was made in the actual possession of the property mortgaged; the business was carried on in the same manner after as before the mortgage; no settlement was made by which the respective rights of the parties were determined; the mortgagor was deeply embarrassed and in constant apprehension that his creditors would attach his goods, which fact the mortgagee well knew, as also he did the motive which induced the mortgagor to act."

339. An overstatement of the amount secured, made with a fraudulent intent to hinder, delay, and defraud the mortgagor's creditors, renders the mortgage void.⁴ But the mere fact that the mortgage secures a greater sum than was actually due is not conclusive of fraud,⁵ unless there was an actual fraudulent intent on the part of the mortgagee,⁶ though the mortgagor was insolvent at the time, and this fact was known to the mortgagee. But such

¹ *Johnson v. Stellwagen* (Mich.) 34 N. W. Rep. 252, per Campbell, C. J.

² *Wheelden v. Wilson*, 44 Me. 1. See *Hartman v. Allen*, 9 Lea (Tenn.), 657.

³ *Wheelden v. Wilson*, *supra*.

⁴ *Anderson v. Hunn*, 5 Hun (N. Y.), 79; *Bailey v. Burton*, 8 Wend. (N. Y.) 339; *Hawkins v. Alston*, 4 Ired. (N. C.) Eq. 137; *Wright v. Hencock*, 3 Munf. (Va.) 521; *Bennett v. Union Bank*, 5 Humph. (Tenn.) 612; *Mitchell v. Beal*, 8 Yerg. (Tenn.) 134; *Wallach v. Wylie*, 28 Kans. 138; *S. C.* 15 Rep. 145, quoting text; *Winstead v. Hulme*, 32 Kans. 568.

⁵ As stated in § 92. See *Weeden v. Hawes*, 10 Conn. 50; *Willison v. Desenberg*, 41 Mich. 156; *Tully v. Harloe*, 35 Cal. 302; *Butts v. Peacock*, 23 Wis. 359; *Blakeslee v. Rossman*, 43 Wis. 116, 123; *Barkow v. Sanger*, 47 Wis. 500; *S. C.* 3 N. W. Rep. 604; *Wood v. Scott*, 55 Iowa, 114; *S. C.* 7 N. W. Rep. 501; *Bush v. Bush*, 33 Kans. 556; *Corbin v. Kincaid*, *ib.* 649.

⁶ *Van Patten v. Thompson* (Iowa), 34 N. W. Rep. 763.

an overstatement of the mortgage debt is a badge of fraud.¹ If the mortgagee also knew that he was taking a mortgage for more than was due, it would be difficult, in the absence of a reasonable explanation, to resist the conclusion that it was taken with fraudulent intent.² The overstatement may have been a mistake; or the mortgage may have been intentionally and in good faith made in this form, in order to cover future advances in addition to the amount of an actual debt; and in such case, if it appear by the recitals of the deed that it was the purpose of the parties to provide for future advances, the overstatement will not even be *prima facie* evidence of fraud.³

The fact that a part of a loan secured by a mortgage was not paid over at the time of the execution of the mortgage does not invalidate the mortgage as a security for the full face of it, if the whole amount of the mortgage is paid over to the mortgagor before possession is taken under the mortgage.⁴

It is incumbent upon the mortgagee to overcome the presumption of fraud arising from an overstatement of the amount, by satisfactorily showing why an amount larger than the actual indebtedness was secured.⁵

340. The question of fraudulent intent, where the transaction is equivocal, and different inferences may be drawn as to its character, or where there is conflicting evidence as to the good faith of the transaction, or its validity or invalidity, rests upon extrinsic facts, is a question for the jury and not for the court.⁶

The question of fraudulent intent is generally determined from the existence of other facts which tend to establish it. The question of the existence of facts showing a fraudulent intent is alone for the jury to determine and not for the court.⁷

The burden of proving fraud is upon him who alleges it;⁸ and

¹ Wood v. Scott, 55 Iowa, 114.

² Wood v. Scott, *supra*, per Adams, C. J.

³ Frost v. Warren, 42 N. Y. 204.

⁴ Mercantile Co. v. Burson, 38 Kans. 278; 16 Pac. Rep. 664.

⁵ Carson v. Byers, 67 Iowa, 606.

⁶ Weaver v. Reilly, 21 Hun (N. Y.), 585; S. C. 10 N. Y. Weekly Dig. 241;

Rozell v. Denver Leather, Whip & Collar Co. 26 Kans. 548; Herkelrath v. Stookey, 63 Ill. 486; Potter v. McDowell, 31 Mo. 62.

⁷ Hedman v. Anderson, 6 Neb. 392; Davis v. Scott (Neb.), 34 N. W. R. 353.

⁸ Washington v. Ryan, 5 Bax. (Tenn.) 622; Ensign v. Roggencamp, 13 Neb. 30.

the proof is insufficient unless it creates a clear and full impression that the allegation is true.¹

341. A provision of statute that fraudulent intent shall be deemed a question of fact precludes the application of the rule of constructive fraud to a mortgage or other instrument; but this provision is held to apply only to cases of actual and intended fraud, and not to written instruments which the law adjudges to be fraudulent on their face, and consequently void.²

342. A mortgagee's title cannot be defeated by the subsequent acts or declarations of the mortgagor impeaching it as void against his creditors.³ His declarations that the mortgage was made for a fraudulent purpose are inadmissible, unless it be shown that the mortgagee had knowledge of such purpose at or before the delivery of the mortgage.⁴ The fact that the property consisted of goods in a store, and that the mortgagor retained possession of them, and used and sold them, and applied the proceeds to his own use, will not make such declarations admissible.⁵

The declarations of the mortgagor made at the time of the execution of the mortgage are admissible in evidence as part of the *res gestæ*;⁶ and so are his declarations afterwards while in possession.⁷

343. A mortgagee is not affected by the fraudulent act of the mortgagor alone,⁸ although the act be done while the latter is acting as the agent of the former, if it be not within the scope of the agency. Thus, a mortgagee having intrusted the mort-

¹ *Pogodzinski v. Kruger*, 44 Mich. 79; *Stookey*, 63 Ill. 486; *Donaldson v. Johnson*, 2 Chand. (Wis.) 160.

² *Robinson v. Elliott*, 22 Wall. 513.

⁵ *Donaldson v. Johnson*, *supra*.

³ *Perkins v. Barnes*, 118 Mass. 484. See *Winchester v. Charter*, 97 Mass. 140; *Merrill v. Dawson*, Hemp. 563; *Cornish v. Dews*, 18 Ark. 172; *Hempstead v. Johnston*, Ib. 123; *Walker v. Henry*, 85 N. Y. 130.

⁶ *Bushnell v. Wood*, 85 Ill. 88; *Potter v. McDowell*, 31 Mo. 62.

⁷ *City Bank v. Westbury*, 16 Hun (N. Y.), 458.

⁴ *Bentley v. Wells*, 61 Ill. 59; *Brown v. Riley*, 22 Ill. 45; *Meixsell v. Williamson*, 35 Ill. 529; *Bell v. Prewitt*, 62 Ill. 361; *Prior v. White*, 12 Ill. 261; *Wheeler v. McCorristen*, 24 Ill. 40; *Herkelrath v.*

⁸ *Citizens' Bank v. Rhutasel*, 67 Iowa, 316; *Whipple v. Stebbins* (Mich.), 35 N. E. Rep. 94; *Heineman v. Hart*, 55 Mich. 64, 76; 20 N. W. Rep. 792; *Root v. Potter*, 59 Mich. 498; 26 N. W. Rep. 682; *Field v. Fisher* (Mich.), 32 N. W. Rep. 838; *Millar v. Olney* (Mich.), 37 N. W. Rep. 558.

gagor with filing his mortgage, the latter at the time of filing it, for his own purposes and without the mortgagee's knowledge, requested the clerk to hide the mortgage at the bottom of the pile, so that it might not be seen, as he did not wish it known that he had given it; and it was held that this request not being within the scope of the agency, the mortgagee's right was not prejudiced.¹ But where a mortgage was intrusted by a mortgagee to the mortgagor to be recorded, and he left it with the recording officer, with instructions to "keep it out of sight for a few days," it was held that this was equivalent to a request that the mortgage should not be placed on record until further orders; and that an attachment made in the mean time took precedence.²

A mortgagee is not affected by the fraud of the mortgagor who has purchased the property and obtained possession of it by fraudulent representations, unless such mortgagee has knowledge of the fraud at the time of taking his mortgage. He is not deprived of his rights by a subsequent knowledge of the fraud.³

344. The understanding of a witness as to what was to be included in a mortgage is not admissible to show fraud in its execution, especially when it is not shown at what time the witness had the understanding. Neither are the declarations of the conveyancer who drafted the mortgage admissible for the purpose of showing fraud in including part of the property described in it.⁴

345. Only creditors of the mortgagor and purchasers in good faith can assail a mortgage under which the mortgagor retains possession.⁵ Before a creditor can contest a mortgage on this ground he must show that he is a creditor in good faith; and before a purchaser can contest it he must establish the fact that he is a purchaser for value and in good faith.⁶ A creditor at large of the mortgagor cannot attack the mortgage. He must first clothe himself with a judgment and execution, or with some

¹ Case v. Jewett, 13 Wis. 498.

² Low v. Pettengill, 12 N. H. 337.

³ Kranert v. Simon, 65 Ill. 344; Michigan Cent. R. R. Co. v. Phillips, 60 Ill. 190; Chicago Dock Co. v. Foster, 48 Ill. 507.

⁴ Hurd v. Gallaher, 14 Iowa, 394.

⁵ Ellingboe v. Brakken, 36 Minn. 156.

⁶ § 245; Pyle v. Warren, 2 Neb. 241; Turner v. Killian, 12 Neb. 580; Ransom v. Schmela, 13 Neb. 73; S. C. 15 Rep. 19; Bynum v. Miller, 86 N. C. 559.

legal process against the property ; for creditors cannot interfere with their debtors' property without process.¹

Creditors of a mortgagor may impeach a mortgage for fraud, although the mortgagor himself might not be heard to impeach it for that reason ; therefore, in an action by the mortgagee against a judgment creditor of the mortgagor for a wrongful taking and conversion of the property, such a creditor may show in mitigation of damages that the mortgage was given and taken with intent to defraud creditors. In such case it does not matter that the mortgaged property was exempt from sale on execution.²

A creditor by attaching property or levying execution upon it acquires a specific lien, which entitles him to impeach a prior mortgage as fraudulent.³

In some states a creditor may call in question an existing mortgage by garnishee or trustee process.⁴

A purchaser at an execution sale of chattels subject to a mortgage has the same right to attack the validity of the mortgage that the judgment creditor himself had, unless the chattels be sold expressly subject to the mortgage.⁵

As between the parties to a chattel mortgage, it is valid and may be enforced, however fraudulent it may be as to creditors.⁶

An assignee under a general assignment for the benefit of creditors has not generally the right to impeach a mortgage on the ground that it is fraudulent as against creditors of the mortgagor.⁷

By statute in New York an assignee for the benefit of creditors may, for their benefit, treat as void any transfer made in fraud of the rights of creditors.⁸ Under this statute such assignee has the same right, as has a creditor having a specific lien, to contest a fraudulent mortgage.⁹

¹ *People's Sav. Bank v. Bates* (U. S.), 7 Sup. Ct. Rep. 679; *Thompson v. Van Vechten*, 27 N. Y. 568, 582; *Fearey v. Cummings*, 41 Mich. 376, 383; 1 N. W. Rep. 946; *Overstreet v. Manning*, 67 Tex. 657; *Ellingboe v. Brakken* (Minn.), 30 N. W. Rep. 659.

² *Jewett v. Fink*, 47 Wis. 446.

³ *Frost v. Mott*, 34 N. Y. 253; *Rinchey v. Stryker*, 26 How. (N. Y.) Pr. 75; *Murtha v. Curley*, 47 N. Y. Superior Ct. 393; *Braley v. Byrnes*, 20 Minn. 435.

⁴ *Fearey v. Cummings*, *supra*.

⁵ *Wagner v. Jones*, 7 Daly (N. Y.), 375.

⁶ *Davis v. Ransom*, 26 Ill. 100; *Upton v. Craig*, 57 Ill. 257; *Ward v. Enders*, 29 Ill. 519; *Lowry v. Orr*, 1 Gilm. (Ill.) 70; *Choteau v. Jones*, 11 Ill. 300; *Harmon v. Harmon*, 63 Ill. 512.

⁷ *Keller v. Smalley*, 63 Tex. 512; *Williams v. Winsor*, 12 R. I. 9; *Gibson v. Warden*, 14 Wall. 244, 248.

⁸ St. 1858, ch. 314.

⁹ *Ball v. Slafter*, 26 Hun, 353; *Southard v. Benner*, 72 N. Y. 424. See §§ 244, 245, 363.

346. A mortgage is void only as to creditors who are hindered and defeated, and who have raised the issue of fraud by their pleadings. The statute does not make the conveyance absolutely void as to all persons. The case is different from a mortgage void for usury or gaming where other incumbrances must, *ex necessitate*, when the tainted instrument is removed, take its place. A creditor claiming to set aside a mortgage as fraudulent must establish his position as one of those in whose aid the statute is framed.¹

347. A junior mortgagee, upon proof that a prior mortgage of the same property was fraudulent as to creditors, is entitled to a judgment setting it aside.² And so a purchaser at a sale under a junior mortgage may impeach the validity of a prior mortgage; and it is even held that he is not precluded from doing this by reason that the auctioneer in making the sale announced that it would be made subject to the other mortgage, and in consequence of this announcement the property was sold at much less than its real value; for if the other mortgage was not already a valid lien, the declaration of the mortgagee could not make it so.³

But to entitle a junior mortgagee to avoid a prior mortgage on the ground of fraud, he should first show by evidence *dehors* the instrument itself that his own mortgage was taken for a valuable consideration, or to secure the payment of an honest debt.⁴

348. A bill in equity to obtain the surrender and cancellation of a mortgage may under some circumstances be maintained against the mortgagee. Thus, the assignee of an insolvent debtor, denying the validity of a recorded mortgage upon property be-

¹ *National Bank v. Sprague*, 21 N. J. Eq. 530. "That he occupies such position the parties adverse to him in interest may contest, and the only way in which the issue can be formed and this matter brought to the consideration of the court is by the pleadings. If the creditor sets up this defence in answer, the debtor or the preferred creditor may show that he assented to the arrangement, that he has released his claim to the property affected by it, or any other matter applicable to the case; and if he files no answer, the

court cannot even say that he is dissatisfied with the arrangement. The affirmative is upon the creditor, and it is incumbent upon him to place himself upon the record so that his opponent can be heard and his case adjudicated."

² *Anderson v. Hunn*, 5 Hun (N. Y.), 79.

³ *White v. Graves*, 68 Mo. 218.

⁴ *Baskins v. Shannon*, 3 N. Y. 310; and see *Wray v. Fedderke*, 43 N. Y. Superior Ct. 335.

longing to the estate, may maintain such a bill against a mortgagee who has not taken possession of the property, or in any way intermeddled with it. There is in such case no cause of action at law against the mortgagee, and he might keep the apparent incumbrance upon the property indefinitely, unless the cloud can be removed by bill in equity.¹

Creditors of an insolvent estate may maintain a bill in equity against the debtor's administrator, to whom the debtor had fraudulently conveyed property in mortgage, to have the mortgage declared void, and he may be enjoined pending the proceedings from selling the property under his mortgage.² Such a bill may also be brought against the administrator and a fraudulent mortgagee, when the administrator has refused or neglected to take any steps towards recovering the mortgaged chattels as assets of the estate.³ It is true the administrator is the representative of the creditors and of the next of kin as well, and in the former capacity might be able to make good his claim to a sufficient amount of the mortgaged property to enable him to pay the debts. But the impracticability of taking an account of the debts at law, and proportioning the recovery to the amount required to pay them, would render a resort to equity indispensable to do entire justice between the parties even if the assets were legal in their nature.⁴

349. A mortgage procured by duress is wholly void. It is void as against the mortgagor as well as against others. Thus if a creditor fraudulently obtains possession of his debtor's property, and refuses to surrender it until the debtor executes a note and mortgage for an amount much in excess of the actual debt, the mortgage is wholly void.⁵

A chattel mortgage procured to be executed under threat of arrest is void not only because given under duress, but also because it is against public policy to permit such an abuse of process.⁶

A mortgage which a blind or illiterate person has been induced to execute in ignorance of its contents is wholly void.⁷

¹ *Sherman v. Fitch*, 98 Mass. 59.

² *Becker v. Anderson*, 6 Neb. 499.

³ *Hagan v. Walker*, 14 How. 29.

⁴ *Hagan v. Walker*, *supra*, per Curtis, J.

⁵ *Lightfoot v. Wallis*, 12 Bush (Ky.),

⁶ *Bane v. Detrick*, 52 Ill. 19.

⁷ *Owens v. Thomas*, 6 U. C. C. P. 383.

See *Shepherd's Touchstone*, 56; *Bennet*

v. Vade, 2 Atk. 324, 327.

350. A mortgage fraudulent in part may be void in toto. If a mortgage be void because of an intention participated in by both parties to delay, hinder, and defraud the mortgagor's creditors, it is fraudulent *in toto*, and cannot be supported to any extent as against such creditors; it cannot be supported to the extent of an actual debt covered by such mortgage.¹ If a statute of frauds either expressly or by necessary implication make a conveyance contrary to the statute totally void, such a conveyance cannot be good in part and bad in part, but it is void *in toto*, both as to creditors and as between the parties, and no interest passes to the grantee under the part which is good.²

A mortgage which contravenes the insolvent laws as to some portion of the debt secured is wholly void.³

A mortgage made to secure promissory notes, a part of the consideration of which is spirituous liquors sold in violation of law, is wholly void.⁴

In New York, and one or two other states, a mortgage which is void by reason of containing provisions allowing the mortgagor to sell merchandise covered by it in the usual course of trade, for his own benefit, is void as to every other kind of property embraced in it. Being void as to a part of the property included in it, it is void as to the whole. The fraudulent and unlawful intent of the parties cannot be confined to a part of the property, but vitiates the entire instrument, although it may include lands or other property as to which it would be valid if it could be regarded as a mortgage of that only, and in relation to which there is a *bond fide* intent to convey it as security for an honest debt.⁵

¹ Weeden v. Hawes, 10 Conn. 50; Beall v. Williamson, 14 Ala. 55; Sommerville v. Horton, 4 Yerg. (Tenn.) 541.

Text quoted with approval in Wallach v. Wylie, 28 Kans. 138, 153.

² Hyslop v. Clarke, 14 Johns. (N. Y.) 458; Mackie v. Cairns, 5 Cow. (N. Y.) 547. In the former case the court, by way of illustration, say that it appears to be an established rule, that where a bond is void in part, as against the positive provisions of a statute, the whole bond is void; citing Norton v. Simmes, Hob. 12, ch. 14, and Maleverer v. Redshaw, 1 Mod. 35. In the latter case one of the judges said: "I have heard Lord Hobart say upon this occasion

that because the statute would make sure work, and not leave it to exposition what bonds should be taken, therefore it was added that bonds taken in any other form should be void. For, said he, the statute is like a tyrant: where he comes he makes all void; but the common law, like a nursing father, makes void only that part where the fault is and preserves the rest."

³ Denny v. Dana, 2 Cush. (Mass.) 160. Quoted with approval in Wallach v. Wylie, *supra*.

⁴ Brigham v. Potter, 14 Gray (Mass.), 522.

⁵ Russell v. Winne, 37 N. Y. 591; S. C. 4 Abb. Pr. N. S. 384; Goodrich v. Downs,

351. But a mortgage not actually fraudulent may be valid in part and void in part. Such is the case where a mortgage secures a debt which is in part valid and in part void for usury.¹ And so a mortgage obtained under inequitable or suspicious circumstances, but not with a fraudulent intent, may be set aside in part and allowed to stand as a security for what is equitably due.² Although a mortgage be inoperative as to part of the property described, because it has not been acquired, it is not for that reason invalid in respect to other property which the mortgagor owned at the time of executing the mortgage.³

A mortgage covering a stock of goods and fixtures, although void as to the stock of goods by reason of the mortgagor's right to continue in possession and sell them, is held binding upon the fixtures, as to which the power of sale did not apply.⁴

351 a. A fraudulent mortgagee is liable to account for all moneys collected under a mortgage void as to the mortgagor's creditors, for the property conveyed as to them is still the property of the mortgagor, and the mortgagee holds it in trust for such creditors; and in the same way he holds in trust for them any moneys he may have received from a sale of the mortgaged property. He is not even entitled to set off, against money so collected on such a mortgage, any sums he may have paid as a consideration of such mortgage, though he is entitled to be credited for any sums he has applied in payment of debts of the mortgagor.⁵

6 Hill (N. Y.), 438; Jackson v. Packard, 6 Wend. (N. Y.) 415; Mittnacht v. Kelly, 3 Abb. (N. Y.) Dec. 301; Goodhue v. Berrien, 2 Sandf. Ch. (N. Y.) 630; Harman v. Hoskins, 56 Miss. 142; Horton v. Williams, 21 Minn. 187; Wilson v. Voight, 9 Colo. 614; 13 Pac. Rep. 726. See *contra*, § 351.

¹ Langdon v. Gray, 52 How. (N. Y.) Pr. 387.

² Weeden v. Hawes, 10 Conn. 50.

³ Gardner v. McEwen, 19 N. Y. 123; Van Heusen v. Radcliff, 17 N. Y. 580.

⁴ Lund v. Fletcher, 39 Ark. 325; *In re Kahley*, 2 Biss. 383; Barnet v. Fergus, 51 Ill. 352; Schemerhorn v. Mitchell, 15 Bradw. (Ill.) 418; Cook v. Halsell, 65

Tex. 1; Donnell v. Byern, 69 Mo. 468; State v. Tasker, 31 Mo. 445; Voorhis v. Langsdorf, 31 Mo. 451; State v. D'Oench, 31 Mo. 453; *Re Kirkbride*, 5 Dill. 116. In the latter case Judge Dillon, referring to the cases upon this point in Missouri, said: "I am entirely satisfied that these cases show that when the conveyance is not actually fraudulent, and when the power of disposition is retained as to part of the property, and as to part it is not retained, it is constructively fraudulent only as to that portion of the property as to which the power of disposition exists." See *contra*, § 350.

⁵ Ferguson v. Hillman, 55 Wis. 181; S. C. 12 N. W. Rep. 389.

III. *Trust Assignments in the Nature of Mortgages.*

352. A conveyance or assignment by a debtor of his personal property to a creditor upon trust to sell and pay his debt to one or more creditors, with a reservation to himself of any surplus there may be, is in effect a mortgage.¹ The reservation of the surplus is only an expression of what the law would imply without a reservation, and is no evidence of a fraudulent intent.² Such an assignment is to be distinguished from an assignment to trustees for the payment of specific debts with a reservation of the surplus to himself.³ "The surplus is always within the reach of the other creditors, and can, by a creditor's bill or proceedings supplementary to the execution, be attached and appropriated to the payment and satisfaction of their debts. Such a disposition of a debtor's estate is therefore free from the weightiest objections against assignments upon trust to third persons for the payment of debts. There is no trustee interposed between the creditors and the property of their debtor. The assignee does not acquire the entire legal interest in the property conveyed subject to the trust, but a specific lien upon it; and the property is still subject to the process of the courts, and may, subject to the mortgage creditor, be devoted to the satisfaction of the other creditors' debts."⁴

Assignments upon trust, to pay debts giving preferences, are not favored by the courts, and are only upheld when they do not

¹ *Leitch v. Hollister*, 4 N. Y. 211; *McClelland v. Remsen*, 36 Barb. (N. Y.) 622; *S. C.* affirmed, 5 Abb. Pr. N. S. 250; 3 Keyes, 454; *Dunham v. Whitehead*, 21 N. Y. 131; *Smith v. Beattie*, 31 N. Y. 542; *Wilson v. Russell*, 13 Md. 494; *Fouke v. Fleming*, Ib. 392; *Henshaw v. Sumner*, 23 Pick. (Mass.) 446; *Davidson v. King*, 47 Ind. 372; *Godchaux v. Mulford*, 26 Cal. 316; *Catlin v. Currier*, 1 Sawyer, 7; *Hempstead v. Johnston*, 18 Ark. 123; *Gage v. Chesebro*, 49 Wis. 486; *S. C.* 5 N. W. Rep. 881; *Davis v. Scott*, 22 Neb. 154; *Nelson v. Garey*, 15 Neb. 531; *Bonns v. Carter*, 20 Neb. 566; 31 N. W. Rep. 381; *Harkrader v. Leiby*, 4 Ohio St. 602; *Dickson v. Rawson*, 5 Ib. 218; *Stiles v. Hill*, 62 Tex. 429; *La Belle Wagon Works v. Tidball*, 59 Tex. 291.

But see, otherwise, *Brown v. Webb*, 20 Ohio, 389; *Selz v. Evans*, 6 Bradw. (Ill.) 466; *S. C.* 12 Chicago L. N. 385. These cases are bad law.

² A provision that the residue of the property mortgaged, after enough has been sold to pay the mortgagor's debt, should be returned to him, does not impair its validity as a mortgage. *Stiles v. Hill*, *supra*.

³ Upon the distinction between an assignment in the nature of a mortgage, and an assignment for the benefit of creditors, see *Bartlett v. Teah*, 1 Fed. Rep. 768; *Stiles v. Hill*, *supra*; *Bonns v. Carter*, *supra*; *State v. Cooper*, 79 Mo. 464.

⁴ *McClelland v. Remsen*, 36 Barb. (N. Y.) 622, per Brown, J.

violate the condition that the debtor shall devote all his property to the satisfaction of his debts, without qualification, and that he shall receive nothing from the assigned property to himself until all his creditors are paid. Such an assignment, with any reservation by the debtor for his own use or benefit in any way, is fraudulent *per se*, and absolutely void.¹ It is also void if it leaves the property to any extent under the control of the debtor or of his assignee. The rights of the creditors under the assignment must be settled by the deed itself.²

352 a. Whether a transfer of property for the benefit of creditors amounts to an assignment for the benefit of creditors, or a mortgage for the security of particular debts, is a question to be determined by the intention of the parties, as it may be ascertained from the circumstances of the transaction. "If the conveyance is to a trustee, and the debtor intends to divest himself, not only of the title to the property, but of all control over it; if it is intended as an absolute conveyance of all his property, and is made for the purpose of securing a distribution of its proceeds among his creditors, or a portion of them,—in legal effect it is an assignment for the benefit of creditors, no matter what name or designation the parties may have given it. On the other hand, if the intention of the debtor is merely to secure his debt to one or more of his creditors, and the conveyance is not intended as an absolute disposition of his property, but he reserves to himself a right therein, the conveyance will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all of his property, and but a portion of his debts are secured by it."³

Several chattel mortgages made at the same time, transferring the entire property of the mortgagor to certain creditors, with the intent that one of them, for himself and as agent of the others, should take immediate possession and convert the property into

¹ *Bonns v. Carter*, 20 Neb. 566; 31 N. W. Rep. 381; *Wallace v. Wainwright*, 87 Pa. St. 263; *Harkrader v. Leiby*, 4 Ohio St. 602.

² *Owen v. Arvis*, 2 Dutch. (N. J.) 22; *National Bank v. Sprague*, 21 N. J. Eq. 530; *Sheldon v. Dodge*, 4 Denio (N. Y.), 217.

³ *Cadwell's Bank, v. Crittenden*, 66 Iowa, 237, 240, per Reed, J.; *Fromme v. Jones*, 13 Iowa, 474, 480; *Grow v. Crittenden*, 66 Iowa, 277; *Lampson v. Arnold*, 19 Ib. 479; *Farwell v. Howard*, 26 Ib. 381; *Kohn v. Clement*, 58 Ib. 589; *Gage v. Parry*, 69 Iowa, 605; *Winner v. Hoyt*, 66 Wis. 227.

money and divide the proceeds among such creditors, amount to a general assignment, and are void as to other creditors.¹ But such mortgages do not constitute a voluntary assignment if they do not cover all the debtor's property, and it appears that the parties had no fraudulent intent in making them.²

Assignments for the benefit of creditors must conform to the statutory provisions regulating them, and any instrument which is in effect such an assignment, and is in any respect inimical to these provisions, cannot be sustained as a valid general assignment.³

353. A mortgage necessarily creates a trust in favor of the mortgagor as to the surplus, after satisfying the debt secured. Yet such trust is not within the statute of frauds, which declares all transfers of goods made in trust for the party making the same to be void as to creditors. Such a trust is not the object of the mortgage, but is a mere incident; and it is immaterial in this respect whether the instrument be upon its face a mortgage containing the usual defeasance, and there is an open trust as to any excess, or it be in the form of an absolute conveyance, with an understanding that it is merely a security, so that there is a secret trust as to such excess. Other creditors are not in any legal sense hindered, delayed, or defrauded by such a transaction. They may sue notwithstanding, and reach the residuary interest of the mortgagor by attachment and execution, or by bill in equity. This provision of the statute of frauds was not intended to prohibit chattel mortgages, but to prevent a debtor from placing his property in the hands of a trustee to hold for the sole benefit of the debtor to the prejudice of his creditors.⁴

A statute avoiding trusts for the use of the person making the same has no application to trust mortgages made in good faith to

¹ *Winner v. Hoyt*, 66 Wis. 227; *Freund v. Yaegerman*, 26 Fed. Rep. 812; *Kerbs v. Ewing*, 22 Ib. 693; *Perry v. Corby*, 21 Ib. 737; *Austin v. Morris*, 23 S. C. 393.

² *Hoey v. Pierron*, 67 Wis. 262; 30 N. W. Rep. 692; *Gage v. Parry* (Iowa), 29 N. W. Rep. 822; *Campbell v. Colorado Coal & Iron Co.* (Colo.) 10 Pac. Rep. 248; *Waterman v. Silberberg* (Tex.), 2 S. W.

Rep. 578; *Jaffray v. Greenbaum*, 64 Iowa, 492.

³ *Bonns v. Carter*, 20 Neb. 566; 31 N. W. Rep. 381; *Page v. Smith*, 24 Wis. 368; *Norton v. Kearney*, 10 Wis. 443; *Jaffray v. Greenbaum*, *supra*; *Nelson v. Garey*, 15 Neb. 531; *Winner v. Hoyt*, *supra*.

⁴ *Godchaux v. Mulford*, 26 Cal. 316; and see *Catlin v. Currier*, 1 Sawyer, 7.

raise money to pay the mortgagor's debts, although the surplus, after satisfying the debt secured, is by way of resulting trust, or by express stipulation, to be for the use of the mortgagor.¹ Nor has such a statute any application to conveyances made primarily and principally for the use of the grantee, and where the reservation to the grantor is merely incidental and partial.²

Though a mortgage substantially covers all the debtor's property, he honestly believing that there would be a surplus after paying the mortgage debt, the transaction cannot be considered as virtually an assignment.³

354. A provision in a deed of trust to secure creditors that the trustee may continue the business and replenish the stock, if intended merely as a means of enforcing the security, and with a view to winding up the business, does not necessarily make the deed fraudulent, but is only evidence of fraud to be left to the jury.⁴ In such a deed a provision that the grantor shall attend to the business, but shall be under the control of the trustee, who may at any time dispose of the trust property at auction, does not make the deed fraudulent.⁵

A provision in a mortgage of a manufacturer's stock in trade, whereby the mortgagee undertakes to complete the manufacture of the unfinished goods and prepare them for sale, is not inconsistent with his rights and duties as mortgagee, and consequently does not render the assignment void.⁶ Yet, in the case of a general assignment by an insolvent debtor to a trustee for the payment of his debts, a like provision would be adjudged fraudulent and void, because the debtor could not confer such a power without creating delay, which the courts could not control or correct.⁷ But such a power conferred upon a mortgagee does not fall within the principle or reason of the objection to such a power in a trustee, because the mortgagee does not acquire the entire legal and

¹ *Curtis v. Leavitt*, 17 Barb. (N. Y.) 309; *S. C.* 15 N. Y. 9, 124-132, 205-208.

² *Camp v. Thompson*, 25 Minn. 175; *Vose v. Stickney*, 19 Minn. 367; *Truitt v. Caldwell*, 3 Minn. 364; *Parsell v. Thayer*, 39 Mich. 467.

³ *Van Patten v. Thompson* (Iowa), 34 N. W. Rep. 762.

⁴ *Marks v. Hill*, 15 Gratt. (Va.) 400; *Williams v. Lord*, 75 Va. 390; *Cunning-*

ham v. Freeborn, 11 Wend. (N. Y.) 240; *Dunham v. Waterman*, 17 N. Y. 9; *S. C.*

² *Duer*, 166; *Woodward v. Marshall*, 22 Pick. (Mass.) 468.

⁵ *De Forest v. Bacon*, 2 Conn. 633; *Kendall v. N. E. Carpet Co.* 13 Conn. 383; *Marks v. Hill*, *supra*.

⁶ *Smith v. Beattie*, 31 N. Y. 542.

⁷ *Dunham v. Waterman*, *supra*.

equitable interest in the property, and the residuary interest may be reached by execution or bill in equity at the suit of any other creditor.¹

If the natural operation of such a deed of trust be to benefit the grantor, it will be held to be fraudulent and void. Such was held to be the effect of a trust deed under which the trustee was to take possession of the stock of goods of an embarrassed debtor, and continue the business in the same place for an indefinite period, and purchase new goods to replenish the stock, and pay the mortgage creditor out of the profits.²

355. It is not essential to the validity of a mortgage that it be wholly for the benefit of the mortgagee. It is not objectionable that it secures a debt due him and a debt due another, so that the mortgagee holds the mortgage partly in trust for the benefit of a third person. Such a trust does not give it the character of an assignment, within the act requiring assignments to comprehend all the property of the debtor, and to be without preferences.³

A mortgage to trustees to secure demands in favor of several creditors is not necessarily fraudulent as made to hinder, delay, or defraud creditors;⁴ but the question of fraudulent intent in such mortgage is one of fact for the jury.⁵

A mortgage is not objectionable as an assignment for the benefit of creditors which is made to a creditor to secure a debt to him alone,⁶ or to secure a debt to him and also the debts of other creditors named.⁷

¹ *Smith v. Beattie*, 31 N. Y. 542, per Brown, J.

² *State v. Mueller*, 10 Mo. App. 87. "The trustee is to trade not only for the benefit of the *cestui que trust*, but to keep up the business, to keep the trade to the old place for an indefinite period, to keep up the good will of the business; and to carry out his intention an attempt is made to create an elastic mortgage to cover new stock. There is no specific lien upon particular goods; but the attempt is to create a lien which shall expand or contract as the stock varies. The stock must be kept up by the terms of the mortgage, and, if the profits of the business are sufficient,

may be perhaps increased, since there is no inventory and no valuation; and when, in the course of trade, the notes are paid, property to the full value of that originally mortgaged may be turned over intact to the insolvent mortgagor. He is to be allowed, by the intervention of a trustee, to hold his creditors off, and to do thus, indirectly, that which the law will not allow him directly to do."

³ *Morse v. Powers*, 17 N. H. 286.

⁴ *Carter v. Rewey*, 62 Wis. 552.

⁵ *Bagg v. Jerome*, 7 Mich. 145.

⁶ *Passell v. Thayer*, 39 Mich. 467.

⁷ *Chapman v. Hunt*, 14 N. J. Eq. 149; *Gage v. Chesebro*, 49 Wis. 486; *S. C. 5 N. W. Rep.* 881.

IV. *Fraudulent Preferences under Bankrupt and Insolvent Laws.*

356. A debtor has a right to prefer a creditor by a mortgage or otherwise, unless such preference contravene some provision of a bankrupt or insolvent law; and the fact that the consideration of the mortgage is wholly a preëxisting debt does not make it any the less valid and binding as against other creditors of the mortgagor.¹ It is neither illegal nor immoral, says Lord Kenyon, to prefer one set of creditors to another.²

Neither is it illegal to prefer a single creditor. Although the result of the preference be the payment of the preferred debt in full, and the leaving of nothing for the payment of other debts, it does not follow that the debtor intended to defraud his other creditors, or that he did in fact defraud them.³ In a case before the

¹ *Wietz v. Potter*, 32 Fed. Rep. 888; *Woonsocket Rubber Co. v. Falley*, 30 Fed. Rep. 808. **Arkansas**: *Cornish v. Dews*, 18 Ark. 172; *Hempstead v. Johnston*, Ib. 123. **Connecticut**: *Smith v. Skeary*, 47 Conn. 47. **Illinois**: *Funk v. Staats*, 24 Ill. 632; *Thornton v. Davenport*, 1 Scam. 296; *McConnell v. Scott*, 67 Ill. 274; *Prior v. White*, 12 Ill. 261; *Reed v. Noxon*, 48 Ill. 323. **Indiana**: *McTaggart v. Rose*, 14 Ind. 230; *Gilbert v. McCorkle*, 110 Ind. 215; 11 N. E. Rep. 296; *Wright v. Mack*, 95 Ind. 332. **Iowa**: *Meyer v. Evans*, 66 Iowa, 179; *Carson v. Byers*, 67 Iowa, 606; *Poole v. Seney*, 66 Iowa, 502. **Kansas**: *Frankhouser v. Ellett*, 22 Kans. 127, 148, per Brewer, J. **Michigan**: *Hills v. Furniture Co.* 23 Fed. Rep. 432; *Kellogg v. Root*, Ib. 525; *Eureka, &c., Works v. Bresnahan*, 33 N. W. Rep. 834; *Andrews v. Fillmore*, 46 Mich. 315; 9 N. W. Rep. 431; *People v. Bristol*, 35 Mich. 28; *Adams v. Niemann*, 46 Mich. 135; 8 N. W. Rep. 719. **Minnesota**: *Bannon v. Bowler*, 34 Minn. 416; *Berry v. O'Connor*, 33 Minn. 29. **Nebraska**: *Turner v. Killian*, 12 Neb. 580, 584; *Davis v. Scott*, 22 Neb. 154; *Nelson v. Garey*, 15 Neb. 531; *Lininger v. Raymond*, 12 Neb. 19. **New Jersey**: *National Bank v. Sprague*, 20 N. J. Eq. 13. **South Carolina**: *Magovern v. Richard*, 3 S. E.

Rep. 340. **Tennessee**: *Bennett v. Union Bank*, 5 Humph. 612. **Virginia**: *Dance v. Seaman*, 11 Gratt. 778; *Phippen v. Durham*, 8 Ib. 457; *McCullough v. Sommerville*, 8 Leigh, 415; *Skipwith v. Cunningham*, 8 Leigh, 271; *Sipe v. Earman*, 26 Gratt. 563; *Williams v. Lord*, 75 Va. 390. **Wisconsin**: *Carter v. Rewey*, 62 Wis. 552.

Since the repeal of the National Bankrupt Act, the states have very generally enacted laws which make conveyances of property by an insolvent debtor, within a limited time prior to the commencement of insolvency proceedings by or against him, void. For references to such laws, and to the decisions under them, reference must be had to the statutes and to works upon insolvency. For some recent cases arising under such laws, see *Michigan*: *Kellogg v. Root*, *supra*. *South Carolina*: *Wietz v. Potter*, *supra*; *Austin v. Morris*, 23 S. C. 393. **Vermont**: *Knower v. Haines*, 31 Fed. Rep. 513.

² In *Estwick v. Caillaud*, 5 T. R. 420. See, also, to same effect, *Nunn v. Wilsmore*, 8 T. R. 521; *Small v. Oudley*, 2 P. Wms. 427.

³ *Clark v. Hyman*, 55 Iowa, 14, 22; *Campbell v. Warner*, 22 Kans. 604; *Randall v. Shaw*, 28 Kans. 419.

Supreme Court of Kansas, Mr. Justice Brewer, speaking for the court, said :¹ "The exercise of an undoubted right does not show wrong. The debtor sought an extension of the other claims, but he did this in the hope of selling his entire stock and paying all claims. There is nothing to show that this was not a reasonable and justifiable expectation. If so, it does not indicate an intention to defraud. He continued in business, and the proceeds of the sales, with the exceptions to be hereafter noticed, were applied to the payment of his preferred creditor. This does not look like intent to wrong. If he had appropriated the proceeds of such sales or squandered them, such conduct might be significant of wrong ; but applying them fairly and honestly to the payment of his debts, although all went to one creditor, shows honesty of purpose."

A mortgage given by an insolvent debtor with intent to prefer a creditor is not invalid, unless some statute takes away his right to prefer, although such preference by mortgage may operate to delay and hinder other creditors. If made in good faith to secure a creditor, and not at all to delay and hinder other creditors, it is lawful.² Any mortgage interposes an obstacle in the way of the legal remedies of other creditors, and may to that extent be said to hinder and delay them ; but this fact is not of itself sufficient to render the mortgage void, in the absence of an intent to so hinder and delay the mortgagor's creditors.³ Moreover, a mortgage is not invalidated by the further fact that the creditor knows when he takes a mortgage that his debtor is in failing circumstances, and that the intended effect of giving the security will be to delay other creditors in collecting debts due to them.⁴

¹ Frankhouser v. Ellett, 22 Kans. 127, 148.

² **Alabama** : Troy v. Smith, 33 Ala. 469. **Arkansas** : Hempstead v. Johnston, 18 Ark. 123 ; Sparks v. Mack, 31 Ark. 666, 672. **Illinois** : Welsch v. Werschem, 92 Ill. 115 ; Bentley v. Wells, 61 Ill. 59. **Indiana** : Gilbert v. McCorkle, 110 Ind. 215 ; 11 N. E. Rep. 296. **Iowa** : Van Pat-ten v. Burr, 52 Iowa, 518 ; White Lead Co. v. Haas, 33 N. W. Rep. 657 ; Fromme v. Jones, 13 Iowa, 474. **Kansas** : Bailey v. Kansas Manuf. Co. 32 Kans. 73. **Maryland** : Rich v. Levy, 16 Md. 74. **Michi-**

gan : Olmstead v. Mattison, 45 Mich. 617 ; Whipple v. Stebbins, 35 N. W. Rep. 94. **Nebraska** : Rothell v. Grimes, 35 N. W. Rep. 392 ; Leffel v. Schermerhorn, 13 Neb. 342 ; 14 N. W. Rep. 418 ; Shelly v. Heater, 17 Neb. 505 ; 23 N. W. Rep. 521. **New Jersey** : National Bank v. Sprague, 20 N. J. Eq. 13 ; Garretson v. Brown, 2 Dutch. 425 ; affirmed, 3 Ib. 644. **Wisconsin** : Haben v. Harshaw, 49 Wis. 379.

³ Dance v. Seaman, 11 Gratt. (Va.) 778, 782.

⁴ Olmstead v. Mattison, *supra* ; Crome-lin v. McCauley, 67 Ala. 542.

The fact that the mortgagor was insolvent at the time of making a mortgage, and continued in possession of the property a long time, both before and after the maturity of the debt secured, and had no other attachable property, is not conclusive evidence of fraud, but is only a circumstance tending to show it.¹

The fact that a mortgage covers the debtor's present and future stock of goods, and that he has nothing else liable to execution, does not make it conclusively fraudulent.²

The mere preference of individual over partnership creditors, by the execution in the firm name, or by authority of the partners, of a chattel mortgage upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorize the setting aside of the mortgage at the suit of a partnership creditor.³

If the mortgagee had reasonable cause to suppose that the mortgagor was insolvent at the time the mortgage was taken, the mortgage under some statutes is invalid as a fraudulent preference. What amounts to a reasonable cause to believe that the mortgagor was insolvent, is a question of fact to be determined from the circumstances of each particular case. The mere fact that the mortgagor cannot pay the mortgage debt immediately, and asks for time and gives the mortgage to secure time, is no evidence of such a cause of belief.⁴

357. The relationship of the parties to such a mortgage is not of itself evidence of fraud, though it is a circumstance to awaken suspicion.⁵ In a case where a trust deed was attacked as fraudulent because it was made to secure preëxisting debts to kinsfolk and intimate friends at a time when a heavy suit was pending against the mortgagor, and this was just about to ripen into judgment, it was insisted that these facts made the mortgage fraudulent in law, although no fraud in fact was intended. "The

¹ *North v. Crowell*, 11 N. H. 251 ;
Paulding v. Chrome Steel Co. 94 N. Y.
334.

² *Willison v. Desenberg*, 41 Mich. 156.

³ *Fisher v. Syfers (Ind.)*, 10 N. E. Rep.
306.

⁴ See *Deering v. Ladd*, 22 Fed. Rep.
575.

⁵ *Hempstead v. Johnston*, 18 Ark. 123 ;
Frankhouser v. Ellett, 22 Kans. 127, 148,

per *Brewer, J.*; *Sparks v. Mack*. 31 Ark.
666 ; *Bumpas v. Dotson*, 7 Humph. (Tenn.)
310, 317 ; *Troy v. Smith*, 33 Ala. 469 ;
Smith v. Hardy, 36 Wis. 417 ; *Kaye v.*
Crawford, 22 Wis. 320. See *Manseau v.*
Mueller, 45 Wis. 430 ; *Hawkins v. Alston*,
4 Ired. (N. C.) Eq. 137 ; *Clark v. Hyman*,
55 Iowa, 14, 22 ; *Norris v. McCanna*
(Mich.), 29 Fed. Rep. 757.

defect in this position," replied the court,¹ "is in misconceiving the nature and effect of the doctrine of innocent purchasers without notice, or rather in failing to note the very words necessary to be used in announcing it. He is a *bonâ fide* purchaser in the eyes of the law who has paid value without notice of defects in the title of the thing bought, or of fraud upon the part of the seller."

While a mortgage by a husband to his wife should be carefully scrutinized, such a mortgage made in good faith to secure an actual debt is valid.² The fact that the claims of the wife secured by the husband's mortgage to her are stale, does not make the mortgage fraudulent.³ Neither does the fact that the mortgagee allows her husband, the mortgagor, to use part of the mortgaged property for the support of the common family, render the mortgage fraudulent.⁴

358. The fact that a mortgage is given to a single creditor by a debtor in failing circumstances and pressed by other creditors, while it may be considered by the jury with other circumstances in determining the question of fraudulent intent, is not itself conclusive of fraud.⁵ The transaction is valid against

¹ *Surget v. Boyd*, 57 Miss. 485. "Where one has bought under such circumstances, his purchase will ordinarily cut off all unknown equities, and relieve against all secret frauds. But if there be no defects of title to be cured, and no fraud upon the part of the seller to be relieved from, there is no occasion for the buyer to invoke the doctrine, nor can he be compelled to resort to it until the fraud or the defects have been affirmatively established by him who attacks the transaction. Conceding all that is claimed here, the defendants did only what they had a perfect right to do. Pressed by one creditor, they elected to incumber their property in favor of others whom they thought more meritorious, or for whom they felt more affection, and in so doing they exercised a right immemorial in the common law, and one which every man practically and daily exercises when he pays one debt leaving others unpaid. The only way in which other creditors can successfully assail such a convey-

ance is by showing that the debts pretended to be secured are simulated, or that the security was never intended to be enforced, and was given only as a sham to ward off the attacks of others, or that some benefit has been received by the grantor, as by a stipulation for unusual indulgence, or in some other way."

² *Miller v. Krueger* (Kans.), 13 Pac. Rep. 641; *Barley v. Kansas Manuf. Co.* 32 Kans. 73; *Dice v. Irvin*, 110 Ind. 561; 11 N. E. Rep. 488.

³ *Dice v. Irvin*, *supra*. The claims in this case were described as "wrinkled and gray-haired." But it was said that neither the statute of limitations nor the presumption of payment arising from the lapse of time could be applied against the claims. See, also, *Barnett v. Harshbarger*, 105 Ind. 410; 5 N. E. Rep. 718.

⁴ *Dice v. Irvin*, *supra*.

⁵ *Allen v. Kennedy*, 5 N. W. Rep. 624; *S. C.* 49 Wis. 549; *Williams v. Lord*, 75 Va. 390, 402; *Lininger v. Raymond*, 12 Neb. 19.

other creditors, if the jury find that no fraud was actually intended.¹ It does not matter that the creditor knew of his debtor's insolvency and took a transfer of all his property, if he did this with an honest design to secure the debt due himself and with no intent to defraud other creditors.²

The fact that a mortgage was executed upon the same day that a judgment was rendered against the mortgagor, unaccompanied by circumstances calculated to cast suspicion upon the transaction, is not of itself sufficient to attach to it the implication of fraud.³

A mortgage to a creditor executed and recorded prior to a general assignment by the mortgagor for the benefit of all his creditors, although upon the same day, and accepted by the mortgagee without any knowledge that such assignment was contemplated, is valid.⁴

An unregistered bill of sale or mortgage does not become objectionable as giving a fraudulent preference merely because possession of the goods is obtained by means of a transaction which would have been a fraudulent preference had there been no bill of sale. Thus a surety upon a promissory note, having taken a bill of sale as security against his liability, the day before the note fell due was informed by the debtor that he should not be able to meet the note, and was advised by him to do what was legal in the matter. The mortgagee was under the impression that, as the bill of sale was not registered, he was not entitled to seize the goods comprised in it; and it was therefore arranged that some of the articles which were comprised in the bill of sale should be invoiced to him as a purchaser, and sent to him by the debtor. This was done, and a receipt for the purchase money was signed by the debtor. The mortgagee paid the note when it became due, and a few days afterwards the debtor filed a liquidation petition, and was adjudged a bankrupt. When the petition was filed, the goods in question were in the mortgagee's possession, and so remained. The court below held that the transaction by which the mortgagee obtained possession of the goods was a fraudulent preference, and ordered a return of the goods to the trustee, or payment to him of their value; but the Court of Appeal reversed

¹ *Bartels v. Harris*, 4 Me. 146.

⁴ *Van Patten v. Burr*, 55 Iowa, 224;

² *Gage v. Chesebro*, 49 Wis. 486.

Nelson v. Garey, 15 Neb. 531.

³ *Thornton v. Davenport*, 1 Scam. (Ill.)

this decision, on the ground that the property in the goods had passed to the mortgagee by the bill of sale, and his title to them could not be impeached.¹

A mortgage upon the furniture of a hotel to secure the payment of notes payable monthly through a period of five years, and representing the rent of the hotel for that period of time, is not fraudulent in law as against other creditors of the mortgagor; but the mortgagee having acted in good faith and without knowledge of the mortgagor's embarrassment, the mortgage will be held good. Neither is the time the mortgage has to run unreasonable.²

359. Objection under a bankrupt law that a chattel mortgage is not in the usual and ordinary course of business, and is therefore *prima facie* fraudulent, is not applicable to such a mortgage made to secure an honest debt, wholly or partly incurred at the time.³ It is a question for the jury to determine whether the mortgage was made in the usual and ordinary course of business, under the statute.⁴

360. The two clauses of the thirty-fifth section of the bankrupt act, the first avoiding certain acts of the bankrupt if done within four months before the filing of the petition, and the second imposing a like result if the transaction be within six months of that time, differ mainly in their application to two different classes of recipients of the bankrupt's property; that is to say, the first clause is limited to a creditor, and the second to a purchaser or mortgagee. The first refers to the past, and the second to the present. The first clause imports that the consideration is one growing out of a former transaction, and the second imports that the transaction was original and complete in itself at the time it occurred. The first is directed against preferences of creditors; and the second against transfers made to prevent the property from coming to the assignee in bankruptcy, or to hinder or delay the operation and effect of the bankrupt act.

If, therefore, a mortgage be attacked as falling within this sec-

¹ *Ex parte* Symmons, 14 Ch. D. 693;
S. C. 24 Solicitors' Journal, 609.

³ *Moore v. Young*, 4 Biss. 128.

⁴ *Buffum v. Jones*, 144 Mass. 29; *Alden*

² *Stewart v. Cockrell*, 2 Lea (Tenn.), 369.
v. Marsh, 97 Mass. 160.

tion of the bankrupt act, and the consideration of the mortgage be a past transaction, the first clause must be applied, and the right of attack upon the instrument is limited to a transaction had with a view to give a preference to a creditor which has taken place within four months prior to the filing of the petition. If, however, a mortgage was made for a present consideration, an attack upon it is limited to a transaction within six months before the filing of the petition, and to a transaction intended to defeat or delay the operation and effect of the bankrupt act.¹

A *bonâ fide* preference of a creditor by a mortgage made more than four months before the commencement of proceedings in bankruptcy is not open to objection.²

361. An assignee in bankruptcy or insolvency may avoid a mortgage fraudulent under a bankrupt or insolvent law. The title attempted to be passed by such a mortgage vests in such assignee. He is entitled to possession, and may bring an action to enforce his right of possession. Such an action is not analogous to a creditor's bill, and it is no objection to it that the claims against the bankrupt are not in judgment.³ In a recent case before the Court of Appeals of New York, Allen, J., speaking for the court, upon this point said: "The policy of the bankrupt law is to secure an equal distribution of all the property of the bankrupt among his creditors, and this object would be defeated if a fraudulent assignor could set the defrauded assignee at defiance, and a fraudulent conveyance not be contested by the assignee.

¹ Gibson v. Warden, 14 Wall. 244.

As to proof of bad faith on the part of the mortgagee, see Campbell v. Waite, 9 Ben. 166; *In re* Armstrong, 9 Ben. 212.

² Coggeshall v. Potter, 1 Holmes, 75; Bean v. Brookmire, 4 N. Bank. R. 196.

³ Southard v. Pinckney, 5 Abb. (N. Y.) N. C. 184; Robertson v. Todd, 31 Conn. 555, 558; Mann v. Flower, 25 Minn. 500, per Gilfillan, C. J. "The defendants argue that the action is in the nature of a creditor's bill on behalf of the creditors, and that as the creditors could not maintain such a suit without judgments on their claims and executions returned unsatisfied, the plaintiff cannot maintain the action, there having been no judgment and

execution on the claims of the creditors. If the bankrupt law merely gave to the assignee the remedies which the creditors would have had if the proceedings in bankruptcy had not been instituted, there might be something in the argument. But the bankrupt law, instead of vesting in the assignee the remedies of the creditors against the property by judgment, execution, and creditor's bill, vests in him at once the title to the property, — makes him the owner. His remedies to reduce it to his possession are the same as any owner's. He may take the property if he can, or he may bring any proceeding to recover it if detained from him."

Creditors could not well do it after a decree in bankruptcy. They would be practically remediless. The bankrupt court would be a place of refuge for every debtor who had fraudulently disposed of his property, and the bankrupt act a perfect shield for fraud. The assignee represents the creditors' rights without the technical obstructions to the enforcement of those rights by a creditor at large."¹

An assignee in bankruptcy, or an involuntary assignee under a state insolvency statute, represents the mortgagor's general creditors in such a manner as to entitle him to attack the mortgage;² although a voluntary assignee for the benefit of creditors has no greater title than his assignor to the latter's property, and cannot question the validity of his recorded mortgage by suing him in replevin for chattels covered by the mortgage.³

¹ Southard v. Pinckney, 5 Abb. (N. Y.) N. C. 184, 192. "It was held by the late Judge Hall, of the Northern District of New York, that the assignee represented the whole body of creditors, and that it was his right and duty to contest the validity of any mortgage by which one creditor had obtained a preference over another. *In re Metzger*, 2 N. Bank. R. 355. The same principle was asserted by Chase, C. J., in the Circuit Court of Virginia, in Wynne's case, 4 Ib. 23, and by Judge Curtis, in Carr v. Hilton, 1 Curtis, 230. The latter judge says: 'A fraudulent conveyance is no effectual conveyance, as against the interest to be defrauded. This interest the assignee represents, so far as respects all creditors who prove their claims.' In Collins's case (12 Blatchf. 548) fraud was not alleged. The validity of the chattel mortgage was contested upon the sole ground that it had not been filed as required by law, and Judge Hunt held that within the terms of the act none but creditors who had, by judgment and execution, obtained a specific lien on the thing mortgaged, or subsequent purchasers or mortgagees in good faith, could attack the mortgage for the reason alleged, and that the assignee was not within the benefits of the statute. The reasoning of the learned judge, it must be conceded, would apply to a mortgage alleged to be

fraudulent in fact; but in following it as an authority, we think the principle should not be extended so as to prove a shield to actual fraud. The non-compliance with a statute, merely imposing a new condition to the validity of chattel mortgages, for the protection of the particular classes mentioned, and not involving the question of fraud or fraudulent intent, may well be restricted in its operation to the individuals for whose immediate protection it was passed. Upon sound reason, the policy of the law as well as the authorities quoted, and others that might be referred to, there can be no doubt, we think, that the plaintiff, as assignee, has a right of action for property conveyed by the bankrupt in fraud of his creditors, although none of the creditors have acquired a specific lien."

² Wells v. White, 142 Mass. 518.

³ Wakeman v. Barrows, 41 Mich. 363; Frost v. Citizens' Nat. Bank, 68 Wis. 234; Kloeckner v. Bergstrom, 67 Wis. 197; Baumbach v. Miller, Ib. 449. Under a statute which enacts that preferential assignments of a part of an insolvent's property shall be void if made within ninety days of a general assignment, a mortgage cannot be set aside, unless a general assignment has been made. Wietz v. Potter, 32 Fed Rep. 888.

But except in cases of fraud the assignee in bankruptcy or insolvency stands in no better situation than the bankrupt himself as regards mortgaged property; and the title of a mortgage remains unaffected by the mortgagor's assignment in bankruptcy or insolvency, and unaffected by his discharge obtained in the proceedings. The assignment passes only the debtor's interest at that time.¹

362. State courts have jurisdiction of actions brought by assignees to set aside chattel mortgages for fraudulent preferences within the bankrupt act. Such suits are not matters or proceedings in bankruptcy within the meaning of that act; but are brought upon causes of action created by that act, or existing independently of it.²

363. As against a voluntary assignee for the benefit of creditors, a mortgage is valid though it be void as to creditors. Such an assignee is not a purchaser for a valuable consideration. He takes no greater interest than the mortgagor had at the time of the assignment; and the fraudulent mortgage being valid between the parties, it is valid against such assignee, who takes only the interest remaining in the mortgagor at the time of the assignment, namely, the equity of redemption. The mortgagor could transfer no other or greater interest than he possessed and had the right to enforce. His voluntary assignee could acquire no other.³

¹ Winsor v. McLellan, 2 Story, 492; Leland v. Ship Medora, 2 Woodb. & M. 92; Bentley v. Wells, 61 Ill. 59; Badger v. Batavia Paper Manuf. Co. 70 Ill. 302. See § 241.

² Ansley v. Patterson, 77 N. Y. 156; Wheelock v. Lee, 5 Abb. (N. Y.) N. C. 72; Wente v. Young, 12 Hun (N. Y.), 220; Southard v. Pinckney, 5 Abb. (N. Y.) N. C. 184; Mann v. Flower, 25 Minn. 500; Frost v. Citizens' Nat. Bank (Wis.), 32 N. W. Rep. 110; Claflin v. Houseman, 93 U. S. 130. Earlier decisions denied jurisdiction to the state courts of suits by assignees in bankruptcy to set aside such fraudulent conveyances. Voorhies v. Frisbie, 25 Mich. 476.

³ Wakeman v. Barrows, 41 Mich. 363;

Flower v. Cornish, 25 Minn. 473; Mann v. Flower, *supra*; Bennett v. Ellison, 23 Minn. 242; Gere v. Murray, 6 Minn. 305; Meyer v. Evans, 66 Iowa, 179; Keller v. Smalley, 63 Tex. 512; Moser v. Claes, 23 Mo. App. 420. But by statute in some states, as for instance in New York, an assignee for the benefit of creditors has greater power to avoid agreements in fraud of creditors than the creditors themselves have. The assignee may maintain an action to disaffirm any transfer made in fraud of the rights of creditors. Laws 1858, ch. 314; Southard v. Benner, 72 N. Y. 424; Reynolds v. Ellis, 103 N. Y. 115; Hangen v. Hachemeister, 21 J. & S. 532. See § 345.

In Ohio a mortgage invalid as to the

The title of the latter being solely a derivative one under the assignment, he can assert and enforce no claim or right thereunder which the mortgagor could not have legally enforced had he made no assignment. His creditors have the right to avoid the mortgage for fraud against them, and they alone can question it for this reason. They have this right, not as beneficiaries under the assignment, or by virtue of any of its provisions, but as creditors of the mortgagor, without any reference to the assignment, and wholly independent of it.¹

364. Under the bankrupt and insolvent acts, a mortgage of personal property is not necessarily void because it is withheld from record by an arrangement or understanding, between the parties to it, that it should not be recorded unless the mortgagor should have trouble, and it is not in fact recorded until shortly before the mortgagor's insolvency; but this fact is entitled to consideration by the jury in passing upon the question whether it is fraudulent at common law.² A mortgage executed at a time long enough before the mortgagor's insolvency to be valid, is not invalidated by withholding it from record until ten days before the filing of a petition in insolvency against the mortgagor.³

If a mortgagee of after-acquired property take possession of it before proceedings in insolvency are commenced against the mortgagor, the mortgage is valid against his assignee in insolvency, although the mortgagor is then insolvent and the mortgagee knows it. Such taking of possession, though it occur immediately before insolvency proceedings are instituted, is not the acceptance of a preference, but the assertion of a right which has been previously

mortgagor's creditors is invalid as against his assignee for the benefit of creditors. *Blandy v. Benedict*, 42 Ohio St. 295; *S. C.* 33 Am. L. Reg. 256, where many authorities are cited in a note; *Hanes v. Tiffany*, 25 Ohio St. 549; *Lindemann v. Ingham*, 36 Ohio St. 1.

¹ *Flower v. Cornish*, 25 Minn. 473, per Cornell, J. "The mortgagor could not assert this right, nor transfer it to his assignee, as he could not transfer what he did not have; nor can his assignee set up any such claim in behalf of the creditors, as a trustee holding property for their benefit, and, therefore, a representative of

their interests. His relations to the creditors are solely those created by the instrument of assignment under which he holds. He only represents them in respect to their rights and interests under the assignment, and not as to those rights belonging to them independent of its provisions."

² *Folsom v. Clemence*, 111 Mass. 273. See, also, *Croswell v. Allis*, 25 Conn. 301; *Baldwin v. Flash*, 58 Miss. 593; *Jaffrey v. Brown*, 29 Fed. Rep. 476, 482. See § 241.

³ *Gilbert v. Vail* (Vt.), 14 Atl. Rep 542.

acquired under an instrument made when the parties were both competent to contract.¹

365. Only an assignee can claim that proof of the debt releases the security. A first mortgagee is not estopped to claim the property against a subsequent mortgagee by reason of having proved his debt against the estate of the mortgagor in bankruptcy without disclosing his security, while such subsequent mortgagee has not proved his debt. The assignee in bankruptcy might in such case be subrogated to the security of the first mortgagee. But only the assignee can avail himself of the provision of the bankrupt act that the security shall be released upon proof of the whole debt; the subsequent mortgagee can derive no advantage from such provision.²

366. When a mortgage is voidable by the mortgagor, his assignee in insolvency may undoubtedly avoid or affirm it. But if he sells the property in terms subject to the mortgage, he thereby affirms it, and his grantee cannot contest its validity.³

V. *Fraud in Mortgages of Consumable Property.*

367. If the nature of the mortgaged property be such that the mortgagor in using it necessarily consumes it, his possession and use of the property, with the knowledge and consent of the mortgagee, render the mortgage *prima facie* colorable and fraudulent as to the mortgagor's creditors, although it be duly recorded. Thus, if a mortgage be made of "all the hay, grain, and produce growing" on the mortgagor's farm, to secure the payment of a sum of money in one year, and he continue, with the knowledge of the mortgagee and without objection on his part, to use and consume this property in the same manner as he would have done if no mortgage had been made, the jury is bound to infer, in the absence of controlling proof to the contrary, that the mortgage was intended to defraud the mortgagor's creditors.⁴

¹ Chase v. Denny, 130 Mass. 566.

² Cook v. Farrington, 104 Mass. 212.

³ Tuite v. Stevens, 98 Mass. 305.

⁴ Robbins v. Parker, 3 Met. (Mass.) 117; Shurtleff v. Willard, 19 Pick. (Mass.) 202, per Morton, J.; Sommerville v. Horton, 4 Yerg. (Tenn.) 541.

In Robbins v. Parker, *supra*, Wilde, J., said: "The principle, however, on which such a fraudulent intent is to be inferred, must be understood with some limitations. We have no doubt that articles, in their nature subject to be consumed in their use, may be mortgaged without any impu-

But even in that case the mortgage is only *prima facie* fraudulent, and may be proved by evidence *aliunde* to have been given without fraudulent intent or fraudulent effect. Such a mortgage is not conclusively fraudulent. Mr. Justice Strong, of the Supreme Court, upon this point very justly remarks that the retention of possession by the mortgagor involves necessarily the consumption in a greater or less degree of the thing mortgaged; that all personal property is consumed more or less by its use, and certainly the use involves a constant depreciation in value. He further declares that if it be held that authorized consumption of the chattels mortgaged renders the mortgage in all cases fraudulent in law, it follows that no valid mortgage of chattels can be made which stipulates for continued possession by the mortgagor. The registration acts would, under such a rule, be totally inoperative.¹

368. The fact that the goods mortgaged are partly perishable in nature and consumable in use does not necessarily avoid the mortgage; but the character and condition of the goods are matters properly to be considered by the jury in determining whether the mortgage is fraudulent.² Thus a mortgage, not to be enforced for several years, of crops to be grown upon the mortgagor's land, and of all his stock of horses, mules, cattle, and sheep then on the land, or which may afterwards be placed thereon, is not necessarily indicative of fraud. Judge Burks, of the Virginia Court of Appeals,³ justly remarked, in regard to such a mortgage, that instead of indicating fraud, "it is rather indicative of an honest purpose in the grantor to dedicate not only what he had,

tation of fraud, provided they are not to be used, and may be kept without damage until the mortgage debt shall become payable. But if the articles mortgaged are perishable and cannot be so kept, or if they are mortgaged under an agreement or understanding that they may be used and consumed by the mortgagor, then we think the transaction must be considered as collusive and fraudulent against creditors. No other reasonable inference from the conduct of the parties can be made."

¹ Miller v. Jones, 15 N. Bank. R. 150.

² Googins v. Gilmore, 47 Me. 9; Brock-

enbrough v. Brockenbrough, 31 Gratt. (Va.) 580; Quarles v. Kerr, 14 Gratt. (Va.) 48. See, however, Richmond v. Curdip, Meigs, 581; Simpson v. Mitchell, 8 Yerg. (Tenn.) 417; Darwin v. Handley, 3 Ib. 502.

³ Brockenbrough v. Brockenbrough, *supra*. He further declares that the presumption of law is in favor of honesty, and that the court cannot presume fraud unless the terms of the instrument preclude any other inference; citing to this proposition Dance v. Seaman, 11 Gratt. (Va.) 778.

but also what he might make or acquire, to the payment of his debts."

There may be chattels so transient in their existence that they cannot generally be mortgaged.¹ Such are chattels whose only use consists in their consumption. But a mortgage of farm stock, farm produce, and farming tools is clearly not one of this description.² In a mortgage of cattle, and other farm stock and crops, a provision, that "the crops conveyed may be used in getting the stock ready for market," was held not to make the mortgage fraudulent in law. This provision was regarded as being for the benefit of the trust fund, and not of the maker of it.³ A deed of trust of horses, cattle, farming implements, household and kitchen furniture, growing grain and vegetables, which provided that the grantor should retain possession for three years, by paying the interest on the debt secured, is not fraudulent *per se*. It is true that some of the articles embraced in the mortgage must necessarily be consumed in the use, and could not in themselves directly strengthen the security; but indirectly they would have this effect by ministering to the support of the important and substantial chattels relied on as security.⁴

Although a portion of the goods embraced in a mortgage be of so transitory and perishable a nature that they cannot be the subject of a mortgage, this circumstance does not vitiate the mortgage in respect to the residue.⁵

VI. *Fraud arising from the Mortgagor's Possession after Default.*

369. The failure of a mortgagee to take possession at the time of forfeiture, as stipulated in the mortgage, does not generally invalidate the mortgage.⁶ Under the registry laws, the record or filing of a mortgage is made a substitute for a delivery of possession. Whether the mortgaged goods after default continue to

¹ *Sommerville v. Horton*, 4 Yerg. (Tenn.) 541.

² *Shurtleff v. Willard*, 19 Pick. (Mass.) 202; *Ross v. Young*, 5 Sneed (Tenn.), 627, 629; *Masson v. Anderson*, 3 Bax. (Tenn.), 290; *Elmes v. Sutherland*, 7 Ala. 262; *Ewing v. Cargill*, 21 Miss. 79.

³ *Masson v. Anderson*, *supra*.

⁴ *Sipe v. Earman*, 26 Gratt. (Va.) 563; *Cochran v. Paris*, 11 Gratt. (Va.) 348.

⁵ *Shurtleff v. Willard*, *supra*.

⁶ *Hudson v. Warner*, 2 Har. & G. (Md.) 415; *Merrill v. Dawson*, Hemp. 563; *Feurt v. Rowell*, 62 Mo. 524; *Bank of S. C. v. Gourdin*, Speers Eq. (S. C.) 439; *Beall v. Williamson*, 14 Ala. 55; *Sandlin v. Anderson*, 76 Ala. 403; *S. C.* 82 Ib. 330; *Shurtleff v. Willard*, *supra*; *Simms v. McKee*, 25 Iowa, 341.

be holden under the mortgage, or become absolutely the property of the mortgagee, the mortgagor's possession can at most be but evidence of fraud.

The retention of possession by the mortgagor after the law day is neither conclusive evidence of fraud,¹ nor *prima facie* evidence of it; nor a circumstance to which the law attaches the presumption of payment.²

If the mortgage secure several notes falling due at different times, the mortgagee may permit the property to remain in the mortgagor's possession until the happening of the last default.³

370. But in Illinois, Colorado, and Montana the mortgagee must take possession within a reasonable time after default, when possession remains with the mortgagor until default, under a provision to that effect in the deed. If possession be not so taken, the mortgage is regarded as fraudulent *per se*.⁴ The policy of the law, in adopting this rule, is to protect purchasers, and to

¹ Beall v. Williamson, 14 Ala. 55.

² Steele v. Adams, 21 Ala. 534; Sprights v. Hawley, 39 N. Y. 441.

"It may be conceded that it is in general the duty of the mortgagee to avail himself of his security when the mortgage becomes forfeited; and if he delays for an unreasonable time the institution of a suit, or fails to possess himself of the mortgaged property, the inference will be, in a controversy between himself and a stranger, that the debt has been paid; but this is a mere presumption, and may be repelled by evidence. . . . The retention of possession by the mortgagor for an unreasonable length of time may warrant the inference that the debt was paid, or that the mortgage is held up as a protection for his property against the demands of creditors. But these are conclusions which may be repelled by proof that the indulgence of the mortgagee was compatible with fair dealing, and induced by no intention to favor the mortgagor to the prejudice of his creditors. It must, from the very nature of the case, be a question of fact, for the solution of the jury, what length of time unexplained would make the mortgagor's

possession conclusive evidence of fraud on the part of the mortgagee." Planters' & Merchants' Bank of Mobile v. Willis, 5 Ala. 770, 781, per Collier, C. J.

³ Magee v. Carpenter, 4 Ala. 469. See § 374.

⁴ Hanford v. Obrecht, 49 Ill. 146; Wylder v. Crane, 53 Ill. 490. See Lemen v. Robinson, 59 Ill. 115; Burnham v. Muller, 61 Ill. 453; Reese v. Mitchell, 41 Ill. 365, 370; Barbour v. White, 37 Ill. 164; Arnold v. Stock, 81 Ill. 407; Reed v. Eames, 19 Ill. 594; Dunlap v. Epler, 88 Ill. 82; Travis v. McCormick, 1 Mont. 148; Chapin v. Whitsett, 3 Colo. 315.

As to the rights of an assignee of a second mortgage under an assignment made after the maturity of the first mortgage, and while the mortgagor remains in possession, see Van Pelt v. Knight, 19 Ill. 535.

In Utah Territory possession must be taken or foreclosure proceedings commenced within ninety days from the maturity of the obligation, and within one year from the filing of the mortgage. § 229 a.

prevent the perpetration of frauds. As the property vests in the mortgagee on the maturity of the mortgage, and he allows the mortgagor to remain in possession, a purchaser from the latter, or his creditor, is protected, because the law regards his holding possession as evidence that the mortgage is paid; and if it is not paid, it is a fraud on a *bonâ fide* purchaser or creditor that he should be allowed to hold this badge of ownership.¹ The question of diligence is one both of law and of fact. It is for the court to determine what time under the law is reasonable, and for the jury to determine whether the mortgagee reduced the mortgaged chattels to possession within that time.²

If a mortgage be given to secure a debt of several hundred dollars, evidenced by two notes, one for one dollar, payable in one year, and the other for the balance of the debt, payable in about a month, the inference is that the making of the note for one dollar was a mere device to prevent the creditors of the mortgagor from seizing the goods for a long period after the debt had matured, and that the mortgage was fraudulent.³

371. Reasonableness of time for such a purpose is determined by the situation of the parties, and the particular circumstances of the case. Where the parties both reside in the same county, within a few miles of each other, and three days, or even two, are suffered to pass after default without any effort to take possession, the delay, as against third persons acquiring rights, is regarded as unreasonable.⁴ If the parties reside in the same county, one day is not an unreasonable time within which to take possession after maturity.⁵

A mortgagee who makes no effort to obtain possession within a month after the maturity of the debt does not use the diligence

¹ *Arnold v. Stock*, 81 Ill. 407. And see *Cass v. Perkins*, 23 Ill. 382.

² *Wooley v. Fry*, 30 Ill. 158; *Travis v. McCormick*, 1 Mont. 347.

³ *Hixon v. Mullikin*, 18 Bradw. (Ill.) 232.

An arrangement between the mortgagor and mortgagee by which the latter takes possession of the mortgaged property at the maturity of the debt, and forecloses the mortgage by making a private sale of the property back to the mortgagor on

credit, and takes a new mortgage to secure the purchase money, warrants an inference that the scheme was undertaken for the purpose of keeping the possession and enjoyment of it in the mortgagor, in fraud of his other creditors. *Blatchford v. Boyden*, 18 Bradw. (Ill.) 378.

⁴ *Cass v. Perkins*, *supra*; *Wooley v. Fry*, *supra*; *Reese v. Mitchell*, 41 Ill. 365, 370.

⁵ *Reed v. Eames*, 19 Ill. 594.

that is requisite to protect his security.¹ A delay of two days after maturity in taking possession, when there is no unusual obstacle to prevent this, makes the mortgage fraudulent as against creditors of the mortgagor and purchasers from him.²

A purchaser from the mortgagor, who has been allowed to remain in possession two months after default, acquires a title to the property free of the lien of the mortgage, although the purchaser bought with actual notice that such mortgage remained unsatisfied.³

The absence of the mortgagee in another state at the time of the maturity of the mortgage is no excuse for delay on his part in taking possession. He may act through an agent.⁴

Where the mortgage notes were made payable in the city of New York, it was held that the agent of the mortgagee in Chicago had until the next day, after being advised of default in payment of the notes in due course of mail, to sue out a writ of replevin to reduce the mortgaged property to possession, there being no delay in sending the information of default. In such cases it is not necessary to resort to the telegraph as a means of communication, to constitute diligence.⁵

The mortgagee is not required to take possession of the mortgaged property, in order to hold it against creditors and subsequent purchasers from the mortgagor, until the expiration of the days of grace on the note which the mortgage was given to secure. And where the last day of grace falls on Saturday, there is no breach of the condition of the mortgage, requiring the mortgagee to take possession of the property, until the following Monday, and if he take possession on the next day, Tuesday, that will be within a reasonable time.⁶

A mortgagee who endeavored to take possession of the mortgaged property the next day after default in payment, but was unsuccessful, and continuing his efforts was successful the next day, was held not chargeable with laches.⁷

¹ *Hathorn v. Lewis*, 22 Ill. 395, is deemed to be overruled; *Travis v. McCormick*, 1 Mont. 347, affirming *S. C.* 1 Ib. 148.

² *Reese v. Mitchell*, 41 Ill. 365. See, also, *Thornton v. Davenport*, 1 Scam. (Ill.) 296; *Reed v. Eames*, 19 Ill. 594; *Funk v. Staats*, 24 Ill. 632; *Thompson v.*

Yeck, 21 Ill. 73; *Cass v. Perkins*, 23 Ill. 382.

³ *Lemen v. Robinson*, 59 Ill. 115; *Travis v. McCormick*, 1 Mont. 148.

⁴ *Wooley v. Fry*, 30 Ill. 158; *Reed v. Eames*, *supra*.

⁵ *Barbour v. White*, 37 Ill. 164.

⁶ *Arnold v. Stock*, 81 Ill. 407.

⁷ *Buckley v. Lampett*, 24 Ill. 604.

But if a person takes a second mortgage before the maturity of a prior mortgage, the continued possession of the mortgagor after the maturity of the first mortgage is no fraud or injury to the second mortgagee, for he was not misled by it, nor induced to take any steps by reason of such continued possession.¹

372. An extension of the mortgage after maturity, or the taking of a new mortgage for the old debt, will not avail against an intervening execution without seasonably taking possession. Thus where, on the day of the maturity of a mortgage, the mortgagee, without taking possession, extended the time of payment, and surrendered the old note and mortgage, and a new note and mortgage were taken for the old debt and accrued interest, together with a small additional advance of money, it was held that the failure of the mortgagee to take possession on default in payment of the old note rendered the first mortgage void as to creditors, and the lien of the new mortgage was subordinate to that of an execution against the mortgagor that came into the hands of the officer after the execution of the first mortgage, but before the execution and recording of the second mortgage.²

373. As between two mortgagees of the same property, who have permitted the mortgagor to remain in possession an unreasonable time after the maturity of their respective mortgages, although neither can enforce his claim against a third party, yet the one who first acquires possession of the property is entitled to priority as against the other.³

Where there are several mortgages to different persons, all overdue, and the mortgagor holds possession of the mortgaged property, any one of the mortgagees may take possession by virtue of his mortgage, and by so doing acquire a preference over the other mortgagees similarly situated, without reference to the date of his mortgage. Such mortgagees are in the situation of several purchasers of a chattel, where the purchaser who first acquires possession is preferred. This is upon the principle that where different equities are equal, the person who unites to his equity the possession will be preferred.⁴ *Qui prior est tempore, potior est jure.*

¹ *Cunningham v. Nelson Manuf. Co.*

17 Bradw. (Ill.) 510.

² *Burnham v. Muller*, 61 Ill. 453.

³ *Atkins v. Byrnes*, 71 Ill. 326.

⁴ *Constant v. Matteson*, 22 Ill. 546; *At-*

374. When the mortgagee has the option of taking possession before default, as in case a chattel mortgage provides that the mortgagor may retain possession and use of the mortgaged property until the maturity of the debt, with the right in the mortgagee to take immediate possession of the property before the maturity of the debt on the happening of certain contingencies, and any one of the contingencies upon which the mortgagee is entitled to such possession occurs, he may or may not exercise his right to reduce the property to his possession before default in the payment of the debt at maturity, and he is not bound to take possession before the maturity of the debt in order to preserve his lien.¹

Where by the terms of a chattel mortgage the possession of the mortgaged property was to be retained by the mortgagor until the maturity of the mortgage notes, with the right in the mortgagee or his assignee to declare the notes due and the mortgage forfeited, and to take possession on the happening of a certain contingency, it was held that the happening of the contingency provided for did not render the notes absolutely due so as to compel the mortgagee to take possession of the property in order to preserve his lien, but only gave the mortgagee or his assignee the election to treat the notes as due and take possession, or let them stand upon the original terms. Until some affirmative act is done by the mortgagee or his assigns, the rights, duties, and obligations of all the parties remain precisely the same as if the mortgage contained no such provision.²

Where several notes maturing at different dates are secured by the same mortgage, it is optional with the mortgagee to take possession on the first default, or await the maturity of the last note.³

A mortgage given to indemnify a surety may well provide that the mortgagee, without having been damnified as surety, may, upon maturity of the debt, take possession and appropriate the

kins v. Byrnes, 71 Ill. 326. See Burnell v. Robertson, 5 Gilm. 282; Mumford v. Cauty, 50 Ill. 370, 374.

¹ Durfee v. Grinnell, 69 Ill. 371; Beach v. Derby, 19 Ill. 617; Pike v. Colvin, 67 Ill. 227; Simmons v. Jenkins, 76 Ill. 479; Barbour v. White, 37 Ill. 164; Cleaves v.

Herbert, 61 Ill. 126; Wilson v. Rountree, 72 Ill. 570.

² Beach v. Derby, *supra*; Barbour v. White, *supra*; Cleaves v. Herbert, *supra*; Wilson v. Rountree, *supra*.

³ Barbour v. White, *supra*; Cleaves v. Herbert, *supra*; Chapin v. Whitsett, 3 Colo. 315. See § 369 at end.

property to the payment of the debt; and in such case he must take possession accordingly, or the property will be liable to execution against the mortgagor.¹

375. What constitutes a sufficient taking of possession. — A delivery and possession, which would be sufficient to operate against creditors and purchasers on a sale of personal property, is sufficient on foreclosure of a mortgage. The mortgaged property need not in all cases be removed from the premises of the mortgagor, particularly if it is so heavy that its removal would be difficult and expensive. If the mortgagee keeps it under his control, that is sufficient.² There must be something more than a mere formal and temporary change of possession. There must be a real, permanent delivery and change of possession in order to preserve the lien of the mortgage.³

Where there is an actual, visible change of possession on default, and the note secured by the mortgage is destroyed, the property mortgaged becomes the absolute property of the mortgagee, who, after having had it for a reasonable time in his possession, may loan it to the mortgagor, or employ him to use it for the mortgagee's own benefit, precisely as he might any of his other property. His doing so does not raise any legal presumption of fraud.⁴

But the possession of the mortgagee must be long enough to apprise all parties of the change of ownership. Where the mortgagor merely hitches horses, which are the subject of a mortgage, upon the mortgagee's premises for half an hour, and then borrows them, the possession is an insufficient change of ownership.⁵

The fact that the business, in case of a mortgage upon a stock of goods, is continued by the mortgagee in the same shop, under the old sign, and that the mortgagor continues to act as a salesman, is not inconsistent with a *bond fide* change of possession.⁶

¹ Dunlap v. Epler, 88 Ill. 82; and see Goodheart v. Johnson, 88 Ill. 58.

² Funk v. Staats, 24 Ill. 632; Ticknor v. McClelland, 84 Ill. 471, 473, and cases cited.

³ Ticknor v. McClelland, *supra*; Thompson v. Yeck, 21 Ill. 73; Thompson v. Wilhite, 81 Ill. 356; Thornton v. Davenport, 1 Scam. (Ill.) 296. See Allen v.

Carr, 85 Ill. 388; Ewing v. Merkley, 3 Utah, 406.

⁴ Funk v. Staats, *supra*; Cunningham v. Hamilton, 25 Ill. 228; Brown v. Riley, 22 Ill. 45. See Wright v. Grover, 27 Ill. 426.

⁵ McMabill v. Humes, 21 Ill. App. 513; Eagle v. Rohrheimer, *Ib.* 518.

⁶ Read v. Wilson, 22 Ill. 377.

A mortgagee took possession of the mortgaged property on the day the mortgage became due, and placed it in charge of a custodian, in a room in the house of the mortgagor, who surrendered the keys. The custodian remained in charge of the goods night and day until they were attached by a creditor of the mortgagor, except that he was absent fifteen or twenty minutes, when the levy was made; but at that time he held the keys, and left a boy employed by the mortgagor in charge of the goods. It was held that his temporary absence did not amount to a restoration to the mortgagor, so as to render the transaction fraudulent as to creditors, and the property subject to levy.¹

A short time before the maturity of the note secured the mortgagor absconded, leaving the mortgaged property, consisting of horses, on a farm he had rented, whereupon his landlord took possession of the horses, and told the agent of the mortgagee he had the horses there for him, and intended they should go to the mortgagee. It was held that this was sufficient to constitute such landlord the mortgagee's custodian.²

In taking possession it is not necessary that the mortgagee or his agent should remove the property or touch it. It is enough that having the property in view, and where he can control it, he assumes dominion over it. Thus, where the mortgaged property consisted of horses and harnesses, and the mortgagee's attorney, under instructions to take possession of the property at the maturity of the mortgage, went with an officer to the stable where the property was and requested the mortgagor to surrender it, and the latter pointed out the property and leased the stable to the attorney so that the latter could keep the horses there until the day of sale, and a custodian was placed in charge of the property, it was held that the attorney had done all that was necessary to constitute a sufficient taking of possession, and that he was not liable for the subsequent neglect of the custodian in permitting the property to be seized under execution. The property was in view and at hand, with nothing to hinder the removal of it, if the attorney had seen fit, and his putting a third person in charge of it, with directions to prevent its use or control by the mortgagor, was a sufficient act of possession.³

The fact that the mortgagee owns the land upon which the

¹ *Dorland v. Bradley*, 66 Ill. 412.

³ *Gaines v. Becker*, 7 Bradw. (Ill.) 315.

² *Upton v. Craig*, 57 Ill. 257.

property mortgaged to him is situated is a sufficient answer to the objection that he did not take possession of the property upon the maturity of his debt. It is already in his possession.¹

376. In case of a mortgage of a railroad, to constitute a sufficient change of possession as to third parties, it is not necessary for the mortgagees or trustees to take personal supervision of the running of the road, and to discharge all the old officers and employees. It will be sufficient if the former superintendent and other employees carry on the business as the agents or servants of the mortgagees or trustees, and notices are put up along the road of the change in possession.²

377. When a mortgagee purchases at his foreclosure sale he should take possession of the property, and not leave it in the possession of the mortgagor. If he allows the mortgagor to retain the possession of the property after the sale, taking his receipt therefor, the property will be liable to attachment by the creditors of the mortgagor.³ But where, on default, the mortgagee took possession of the property and placed it in the hands of a custodian, where it remained ten days, until the day of sale, when it was sold to a third person, who left it in the possession of the mortgagor, where it was levied on by a creditor of the latter, it was held that the mortgagor's possession was not fraudulent, and the property could not be held under the execution.⁴

378. It is only as against third persons that the mortgage becomes void through the continued possession of the mortgagor after default. The widow, heir, or administrator of the mortgagor is not a *third person*, but is concluded by the lawful acts and contracts entered into by the mortgagor.⁵

¹ Smalley v. Ellet, 36 Ill. 500.

⁴ Hanford v. Obrecht, 49 Ill. 146.

² Palmer v. Forbes, 23 Ill. 301, 314.

⁵ Sumner v. McKee, 89 Ill. 127; Griffin

³ Thompson v. Yeck, 21 Ill. 73. See v. Wertz, 2 Bradw. (Ill.) 487.
Allen v. Carr, 85 Ill. 388.

CHAPTER IX.

MORTGAGES OF MERCHANDISE WITH POWER OF SALE IN THE MORTGAGOR.

I. General statement of the subject, 379-381.	III. The doctrines of the federal and English courts, 410-413.
II. The doctrines of the state courts, 382-409.	IV. A summary of authorities, 414, 415. V. The subject considered upon principle and policy, 416-425.

I. General Statement of the Subject.

379. Introductory. — Whether a mortgage of the stock of goods of a trader or manufacturer, which permits the mortgagor to sell the mortgaged property in the usual course of trade, is necessarily fraudulent, is one of the disputed questions of our jurisprudence.¹ Prior to the enactment of laws for registering mortgages of personal property, the retention of possession by the mortgagor, like retention of property by a vendor after an absolute sale, was either presumptive or conclusive evidence of fraud. This rule was designed to prevent a person from acquiring a false and deceptive credit on the strength of the possession and apparent ownership of property which he had sold or mortgaged. This was a doctrine of the courts, and not a declaration of statute.² The statute of 13 Elizabeth simply avoids all dispositions of property by a debtor, contrived or made “to delay, hinder, or defraud creditors.” The established doctrine in England, however, is, that want of delivery of possession does not make a deed of sale of chattels, as security, absolutely void, but is only evidence of fraud, to go to the jury with all the circumstances of the case.³ In the United States, irrespective of the registry laws, —

¹ See 2 South. L. Rev. (N. S.) 731; vol. 5, p. 617; vol. 6, p. 96.

² Dillon, J., in *Hughes v. Cory*, 20 Iowa, 339; followed and approved in *Clark v. Hyman*, 55 Iowa, 14.

³ *Martindale v. Booth*, 3 Barn. & Adol. 498. The *dictum* of Butler, J., in *Edwards v. Harben*, 2 T. R. 587, is not considered as importing the contrary.

while in some courts the continuing possession of a vendor of personalty is regarded as a fraud at law, or, in other words, conclusive evidence of fraud in the transaction, — the prevailing doctrine is, that such possession is at most only evidence of the fact of fraud, but not a fact, in judgment of law, of itself conclusively establishing the fraud.¹

In the absence of any statutory provision for the recording of chattel mortgages, a stipulation that the mortgagor should retain possession until default has not been generally regarded as conclusive evidence of fraud, because such a stipulation is not unreasonable, nor inconsistent with the purpose of the mortgage; nor is it to be presumed that the mortgagor would thereby gain a false credit.² If such a mortgage were made to secure future advances, without any other consideration at the time, it might, in the absence of any record of it, be regarded as void against creditors, as tending to collusion, and enabling the mortgagor to get credit on his property without any notice that it was incumbered.³ Neither is the continuance of the mortgagor's possession, after the mortgage has become absolute, fraud *per se*, but, at most, only evidence of fraud.⁴

380. Statutes providing for the recording of mortgages of personal property are a substitute for possession by the mortgagee,⁵ and repel all imputation of fraud which would arise from the want of it.⁶ The ground of the common law rule requiring a change of possession was the prevention of secret transfers of personal property; and this is done away with, as regards mortgages of such property, by the statutes providing for the recording of them. Modern legislation, in obedience to the wants of trade, has, through the recording acts, enabled the mortgagor to

¹ See § 320; 18 Am. L. Reg. (N. S.) 137.

² *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Homes v. Crane*, 2 Pick. (Mass.) 607, and numerous cases cited; *Ward v. Sumner*, 5 Pick. (Mass.) 59.

³ Per *Wilde, J.*, in *Badlam v. Tucker*, *supra*.

⁴ *Shurtleff v. Willard*, 19 Pick. (Mass.) 202. And see §§ 369, 370.

⁵ Otherwise in a few states. See §§ 328, 329, 395, 398, 411, and *Noyes v. Brent*, 5 Cr. C. C. 656.

⁶ *Bullock v. Williams*, 16 Pick. (Mass.) 33; *Forbes v. Parker*, 16 Pick. (Mass.) 462; *Shurtleff v. Willard*, *supra*; *Hughes v. Cory*, 20 Iowa, 399, per *Dillon, J.*; *Torbert v. Hayden*, 11 Iowa, 435; *Smith v. Moore*, 11 N. H. 55; *Hoit v. Remick*, 11 N. H. 285; *Clary v. Frayer*, 8 Gill & J. (Md.) 398; *Hambleton v. Hayward*, 4 Har. & J. 443, 446; *Gregory v. Perkins*, 4 Dev. (N. C.) L. 50; *Head v. Ward*, 1 J. J. Marsh. (Ky.) 280, 282.

retain possession of the property without invalidating the security. Possession so retained in conformity with the terms of the mortgage, or with the consent of the mortgagee, outside the mortgage, when this is duly recorded, is not fraudulent *per se*, but it is generally *prima facie* evidence of fraud as against creditors or subsequent purchasers.¹ This change, giving owners of personal property the privilege of using it as security without any actual change of possession, has given an additional value to such property, and been highly beneficial to the community.

Under the registry laws, the retaining of possession by the mortgagor being no longer required, and no longer a badge of fraud in law, there is no reason why a reasonable use of the property by the mortgagor should be held to constitute fraud in law. If the use be such that the property is not consumed by the very act of using it, there can be no reasonable objection to allowing such use.² It is to the advantage, rather than the injury, of creditors of the mortgagor that he should be allowed to make a beneficial and reasonable use of the property.³ If, for instance, a livery stock of horses and carriages be mortgaged for a sum very much less than its intrinsic value, and possession be retained by the mortgagor, a reasonable use of the property would not be incompatible with an honest purpose, but would rather be a necessary incident flowing from the right of possession under the law.⁴

381. There is generally good reason why the mortgagor of a stock of goods should remain in possession of the goods, and continue to sell them in the usual course of his trade. It may, as a rule, be assumed that he can manage them better than the mortgagee, even if any one could be found willing to make a loan and take the business of the borrower in charge in order to obtain security. Such a transfer of the business would be productive of loss to both the parties to the mortgage. Neither can a trader or manufacturer stop his business in order to give security to a mortgagee of his stock.

It is true that recording a mortgage simply operates as a substitute for a change of possession. In this way it may be regarded

¹ Frankhouser v. Ellett, 22 Kans. 127, 147; Sandlin v. Anderson, 76 Ala. 403; S. C. 82 Ib. 330.

² § 384 a.

³ Per Dillon, J., in Hughes v. Cory, 20 Iowa, 399. See §§ 367, 368.

⁴ Per Lowe, C. J., in Torbert v. Hayden, 11 Iowa, 435.

as being in effect a constructive delivery of the property.¹ It does not directly affect the question of invalidity in a mortgage, except it arise from the absence of a change of possession. But indirectly the recording acts have an important bearing upon the question under consideration. The general purpose of these acts is to enable a mortgagor to retain possession of the mortgaged property, and at the same time to give a valid security upon it. The statutes would fail in accomplishing this purpose in respect to important classes of property, namely, merchandise held for sale, and property consumable by use, if the rule of constructive fraud be allowed to intervene, and make mortgages of all such property void. The policy of the registry laws is not consistent with the policy of the rule making void mortgages with power to use and sell mortgaged goods in the usual course of trade; and the latter rule should be made to yield to the more important general policy of the registry laws.

Upon principle, a mortgage of a stock of merchandise which provides that the mortgagor may sell the goods in the usual course of trade, shall keep up the stock to its value at that time, and shall apply the proceeds of the sale to the payment of the debt secured by the mortgage, should not be held to be fraudulent on its face.²

¹ See articles in 10 Cent. L. J. 281, and 6 South. Law Rev. 96.

² *Hughes v. Cory*, 20 Iowa, 399. Judge Dillon, delivering the judgment of the Supreme Court of Iowa to this effect, said: "If the debt be real, and the creditor in good faith desires security, what objection is there, in reason, to just such a transaction as that which is disclosed in the mortgage now before us? The debtor is a merchant. He cannot pay at maturity. He wishes time to dispose of his goods in the usual way; and to secure that, and to prevent a sacrifice at forced sale, is willing to give one of his largest creditors a mortgage on his stock. He is acquainted with the stock, has a business established, and can probably dispose of the goods more advantageously, both for himself and his creditors, than the mortgagee could himself do if he should take possession. Why, we ask, should he not be permitted to

stipulate for time, and for the right to dispose of his goods and apply the proceeds to the payment of his debts? No reason can be given, unless the arrangement be such, from its intrinsic nature or inevitable tendency, as unnecessarily and injuriously to affect or impair the rights of other creditors." Examining the reservations of the mortgage, the learned judge concludes that they cannot be made the means of defrauding other creditors, either by warding them off, or by enabling the mortgagor to secure the enjoyment of the property to himself. The mortgagor's right of reserving a part of the proceeds of the sales is more favorable to his other creditors than would be a provision that the mortgagee should receive all the proceeds of sales; and yet, as will presently be noticed, the leading courts which hold such mortgages to be fraudulent in law, hold also that they are not fraudulent

II. *The Doctrine of the State Courts.*

382. Introductory. — Before entering further upon the consideration of the general principles of law applicable to this subject, it is deemed best to state what the doctrine of the American courts is in relation to such mortgages; and not only on account of the diversity of doctrine held, or rather the numerous modifications made of the principal doctrines, but also because of the diversity of reasons given by different courts for holding the same doctrine, it is deemed best to state the rule adopted in each of the different states that have passed upon the question.

383. In Alabama a mortgage by a debtor engaged in mercantile business, reserving to him the possession of the goods, and the right to continue to carry on the business as before, was formerly held not to be fraudulent in law; but if the debtor was insolvent or in failing circumstances when he executed the mortgage, and the mortgagee knew that fact, there was a presumption of fraud, which, if not rebutted by other facts and circumstances, would make the instrument fraudulent and void as to creditors.¹

Under later decisions, however, a mortgage of a stock of goods which provides or implies a reservation of the possession to the mortgagor, and power to sell, is fraudulent in law against creditors, notwithstanding a parol agreement that the proceeds of sales shall be paid over to the mortgagee.²

Where a mule, which was part of the mortgaged property, was negligently killed by a third person while it was in the possession of the mortgagor, and its value was paid to him without the knowledge of the mortgagee, such payment was not regarded as a badge of fraud in the mortgage.³

383 *α*. Arkansas. — A mortgage which provides that the mortgagor may remain in possession of mortgaged merchandise, and sell the same as his own, is presumptively fraudulent and void

per se when the proceeds of the sales are to be paid wholly to the mortgagee.

¹ *Constantine v. Twelves*, 29 Ala. 607; *Warner v. Wiswall*, 9 Ala. 305, approving the Massachusetts cases; *Wiley v. Knight*, 27 Ala. 336; *Price v. Mazange*, 31 Ala. 701.

² *Owens v. Hobbie*, 82 Ala. 466; 3 So. Rep. 145. And see *Benedict v. Renfro*, 75 Ala. 121; *Renfro v. Goetter*, 78 Ala. 311.

³ *Sandlin v. Anderson*, 76 Ala. 403; 3 So. Rep. 28.

as to other creditors of the mortgagor; and an agreement or understanding to like effect, not contained in the mortgage, has the same effect.¹ Such agreement and understanding may be shown by the conduct of the parties and by the surrounding circumstances.² It seems, however, that a provision that the proceeds of sales should be applied to the payment of the mortgage debt, or so invested as to fix a continuing trust upon them for the purposes of the mortgage, might do away with the presumption of invalidity.³ It seems, also, that the mortgagor might remain in possession and sell the goods as agent of the mortgagee, without invalidating the mortgage.⁴

The mortgagor's possession of the mortgaged merchandise, with a power of disposal, seems, however, to be not conclusive of fraud, but only evidence of it. These circumstances render the mortgage void if they are not explained. The question of fraud is still one of fact for the jury, not a conclusion of law.⁵

384. In Colorado a mortgage of a merchant's stock of goods is void as against his creditors, if the mortgagee voluntarily allows him to continue to carry on his business and sell the goods in the usual course, without applying the proceeds to the reduction of the mortgage debt.⁶

The purchasers of the furniture in a hotel gave the seller a mortgage on the property to secure the unpaid purchase money, reserving to themselves the right to sell the furniture for the purpose of buying better. They sold some of it, and bought other fittings, and gave four chattel mortgages on the old and new furniture, which were foreclosed, and the property sold. The first mortgagee sued the other mortgagees in trover. It was held that the reservation to the mortgagors of the right to sell the mortgaged property rendered the mortgage void *ab initio* as to creditors and incumbrancers.⁷

¹ *Gauss v. Doyle*, 46 Ark. 122; *Fink v. Ehrman*, 44 Ark. 310; *Lund v. Fletcher*, 39 Ark. 325.

² *Gauss v. Doyle*, *supra*.

³ *Martin v. Ogden*, 41 Ark. 186.

⁴ *Gauss v. Doyle*, *supra*; *Fink v. Ehrman*, *supra*.

⁵ *Martin v. Ogden*, *supra*; *Fink v. Ehrman*, *supra*; *Gauss v. Doyle*, *supra*.

⁶ *City National Bank v. Goodrich*, 3 Colo. 139; *Wilcox v. Jackson*, 7 Colo. 521; 4 Pac. Rep. 966; *Wilson v. Voight*, 9 Colo. 614; 13 Pac. Rep. 726.

⁷ *Brasher v. Christophe* (Colo.), 15 Pac. Rep. 403.

In *Wilson v. Voight*, *supra*, the court say: "We do not hold that a mortgage upon merchandise permitting the mort-

When the mortgagee is in possession, and in good faith the mortgagor as his agent continues to sell the mortgaged goods, and appropriates the proceeds to the payment of the mortgage debt, the transaction is valid.¹

384 a. In Dakota Territory no presumption of fraud arises from the continued possession of the mortgagor, or from his dealing with the mortgaged goods in the usual course of trade. The statute of this territory not only allows a mortgage, or lien by way of mortgage, to be given upon personal property without a change of possession, but it absolutely prescribes that the mortgage itself shall not authorize the taking of possession by the mortgagee before default unless the mortgage in express terms so provides.² The legal title does not pass, nor does the right to the possession pass. The mortgage is a mere lien for the security of the party who takes it, that the other party will perform the obligations it sets forth.³

385. In Georgia the Code provides that a mortgage may cover

gagor to continue the sale of goods, but requiring him to apply the proceeds in discharge of the debt secured, is void as to his other creditors. The validity of such mortgages, the transaction being *bonâ fide*, is upheld by many well-considered decisions. In such cases, the value of the security suffers no diminution, except as the debt secured is itself diminished. The transaction is not unlike the delivery of goods in payment of the debt of a preferred creditor; since the aggregate of the mortgagor's indebtedness is reduced, and since he may pay whom he will, the unpreferred creditors are held to suffer no legal wrong."

¹ Wilcox v. Jackson, 7 Colo. 521 ; § 399.

² See § 427.

³ Lake v. Belding, per Moody, Justice of the Supreme Court, at Nisi Prius. The opinion is published at length in The Black Hills Daily Pioneer, Deadwood, Dakota, May 2, 1882: "Then the right to the possession will carry with it what is naturally incident to the right to possession. If it is a property liable to be used up and de-

stroyed by the very use of it, no presumption of fraud can arise, because such is the natural result of the mortgagor's rightful and legal possession. If it is upon a stock of goods that are kept in a store in which a man is doing business, no legal presumption of fraud can arise from the fact that the party is using the goods in the only way that it is natural or possible to use them, to wit, in the ordinary course of trade. Therefore there can be no rule of law laid down which would declare such a transaction a fraudulent one as a matter of law. A mortgage on that kind of property is precisely like one on any other kind of property, either fraudulent and void, or valid, according to the facts and circumstances, or intent of the party gathered from the facts and circumstances, with which the mortgage was given and taken. In other words, under our statute, the question of the intent with which a mortgage or other charge is made upon property is a question of fact and not of law."

a stock of goods, or other things in bulk, but changing in specifics, in which case the lien is lost on all articles disposed of by the mortgagor up to the time of foreclosure, and attaches on the purchases made to supply their place.¹ But such a mortgage can only cover an amount of goods equal to that on hand at the time of the mortgage.² It would be a fraud upon the mortgagor's creditors to make a mortgage upon a small stock of goods and allow it to be enforced upon a large stock, purchased upon credit soon afterwards. But the mortgage is good upon future purchases to the extent of the value of the goods at the time of the mortgage, although such purchases were made on credit and remain unpaid for. As a matter of course, if the goods brought into the stock were stolen, or were at the time subject to some other lien, or some third person had at the time a valid title to them, the mortgage would not cover them.³ Such a mortgage does not cover goods added to the stock by any one other than the mortgagor, and not even additions made by a new firm, which has purchased the stock, and of which the mortgagor remains a member.⁴

386. In Illinois the New York decisions are followed, holding that if by any arrangement, express or implied, the mortgagor is permitted to continue the sale of a mortgaged stock of goods at retail for his own benefit, the mortgage is unavailing against his judgment creditors; and such arrangement or permission, when not contained in the mortgage, may be found by the jury from

¹ Code 1873, and Code 1882, § 1954.

² *Chisholm v. Chittenden*, 45 Ga. 213.

In regard to the position of the State of Georgia upon this question, the enactment of the statute of the state, authorizing mortgages of changing stocks of goods, tends to show that such a mortgage was not there esteemed conclusively fraudulent. The opinion of the court in the case of *Goodrich v. Williams*, 50 Ga. 425, does not afford any indication that the court would, except for the statute, regard such a mortgage fraudulent in law. The point made by the court in that case was, that while a mortgage may cover a stock of goods as it changes by purchases and sales, yet it can only cover an amount

equal to what was on hand at the time.

"The permission to give such a mortgage, though a very convenient privilege, is one very easily used to commit fraud, and we think the spirit of the Code, as well as public policy, requires it to be limited as we have limited it. We have known of several cases where mortgages of this character have been given with a small stock of goods at the time, and large purchases made on credit afterwards." The statute at any rate shows what, in this state, is now regarded as the true policy upon this question.

³ *Goodrich v. Williams*, *supra*; *Johnson v. Patterson*, 2 Woods, 443.

⁴ *Anderson v. Howard*, 49 Ga. 313.

the attending circumstances.¹ When such arrangement or permission is shown to exist, either by the terms of the mortgage or by the finding of the jury, the mortgage is declared void as a matter of law. A right in the mortgagor to sell the mortgaged property and appropriate the proceeds to his own use is regarded as inconsistent with the nature of a mortgage security.² But if the mortgagee takes possession of the mortgaged goods under authority given in the mortgage, the possession so taken is not vitiated because of the vicious provision in the mortgage. The fact, too, that the mortgagee or his agent, after taking possession, permits the mortgagor to continue in the store under his old sign, and sell the goods for the benefit of the mortgagee, does not destroy the apparent good faith of the transaction.³ A provision in a mortgage of a stock of wines, liquors, cigars, and saloon fixtures and furniture, that the mortgagor may retain possession of the property, and use and enjoy it until default, does not necessarily imply that the mortgagor may sell the same, although he is a trader in liquors.⁴ But a mortgage given by a carriage manufacturer upon his stock, taken in connection with a written agreement whereby the mortgagor was allowed to manufacture the materials into carriages, to sell the same, receive the price, and retain a certain sum for each month to enable the mortgagor to run the business, pay the workmen, and support his own family, was held to be fraudulent and void as against other creditors of the mortgagor. The power given to the mortgagor to dispose of the property was regarded as inconsistent with the nature of the security, and prohibited by the policy of the law.⁵ Such a mortgage would be void although it was agreed that the mortgagor should receive and hold the proceeds of the sales as the agent of the mortgagee.⁶ Where a mortgage covers different kinds of

¹ *Simmons v. Jenkins*, 76 Ill. 479, following *Gardner v. McEwen*, 19 N. Y. 123; *Edgell v. Hart*, 9 N. Y. 213; *Davis v. Ransom*, 18 Ill. 396; *In re Forbes*, 5 Biss. 510. In *Read v. Wilson*, 22 Ill. 377, it was held that if the mortgagee in such a mortgage takes possession of the property before the rights of creditors intervene, his possession is not vitiated by the vicious provision in the mortgage. See §§ 395, 401.

² *Greenebaum v. Wheeler*, 90 Ill. 296,

299; *Barnet v. Fergus*, 51 Ill. 352, 355; *Goodheart v. Johnson*, 88 Ill. 58, 61.

³ *Read v. Wilson*, *supra*.

⁴ *Cleaves v. Herbert*, 61 Ill. 126. It may be that the purpose was to keep the liquors in store that they might improve by age. See *Re Foster*, 10 Chicago L. N. 315.

⁵ *Greenebaum v. Wheeler*, *supra*.

⁶ *Dunning v. Mead*, 90 Ill. 376. The statutes of Illinois (R. S. 1845, ch. 20, §§ 1 and 3, and R. S. 1874, ch. 95, § 1) pro-

property,—as for example, a stock of goods in a store held for the purposes of trade, and also horses upon a farm,—it does not follow that the mortgagee, by permitting the mortgagor to sell his stock of goods in the usual way, thereby loses his right to enforce his mortgage lien upon the horses.¹ These principles were applied to a mortgage covering a printing-press and its appurtenances, and certain books and blanks which had been printed by the mortgagor, and which were held by him for sale. The latter property he continued, with the knowledge of the mortgagee, to sell in the same way after the mortgage as before it was made; but the mortgagee had consented to no disposition of the other part of the property, and none had been made. It was held, therefore, that the mortgagee's waiver of his lien as to the books and blanks did not affect his lien upon the printing-press and its appurtenances.²

Moreover, the doctrine is still further qualified in a decision upon a mortgage, which provided that the mortgagor might retain possession of the property and use it until default. The mortgagor accordingly sold a part of the property, and appropriated the proceeds to his own use. There was also evidence of a written consent from the mortgagee to the mortgagor to sell the mort

vide that no mortgage shall be valid against third persons unless possession be delivered to and retained by the mortgagee, or the mortgage provides that possession shall remain with the mortgagor not exceeding two years. The possession so contemplated is a possession for use and custody, and not one for sale or disposal of the property in the course of business and trade, which is regarded as against the evident policy of the statute. *Greenebaum v. Wheeler*, 90 Ill. 296, 298; *Davis v. Ransom*, 18 Ill. 396, 402; *Read v. Wilson*, 22 Ill. 377, 380; *Barnet v. Fergus*, 51 Ill. 352.

¹ *Barnet v. Fergus*, *supra*, per Lawrence, J.: "The utmost that could be said to his injury would be, that, where the *bona fides* of the mortgage come in question, the fact that he has permitted the mortgagor to use the goods in a manner inconsistent with his own rights as mortgagee is a circumstance which a jury would

have a right to consider in determining the question whether the mortgage was originally made to defraud creditors, and is therefore equally void as to both goods and horses. The degree of weight to be given to this circumstance would, of course, greatly depend upon the other evidence in each case. Taken by itself, and with no other circumstances to throw discredit upon the mortgage, it would merely show that the mortgagee had consented to release the goods from the lien of his mortgage, thereby impairing his own security to that extent, but would by no means justify the inference that he intended to abandon his lien upon the horses." See, also, *Read v. Wilson*, *supra*.

² *Barnet v. Fergus*, *supra*. And see *In re Kahley*, 2 Biss. 383; *Goodheart v. Johnson*, 88 Ill. 58; *Garrettson v. Pegg*, 64 Ill. 111; *Ogden v. Stewart*, 29 Ill. 122; *Schemerhorn v. Mitchell*, 18 Bradw. 418.

gaged property at public or private sale.¹ It was held that, under the circumstances of the case, the sale of inconsiderable parts of the property did not render the transaction fraudulent, and did not bring the case within the rule of *Barnet v. Fergus*.

387. In *Indiana* it was at first declared that a mortgage upon a stock of merchandise, which contains a stipulation that the mortgagor may sell and dispose of the property, but contains no covenant that the mortgagor shall apply the proceeds of sales of the mortgaged stock to the payment of the mortgage debt, or the debt of any other creditor, is void upon its face as against other creditors of the mortgagor.² The law upon this point was determined to like effect by the Supreme Court of the United States, in *Robinson v. Elliott*,³ with especial reference to the statutes and decisions of this state. The mortgage in this case was given to indemnify an indorser for the debtor's accommodation, and stress is laid upon the apparent intention of the parties that the business should be carried on by the continued renewal of the notes upon which the indorser was liable; and it was, in fact, so carried on for more than two years. The necessary result of the mortgage was to allow the mortgagors, under cover of the mortgage, to sell

¹ *Goodheart v. Johnson*, 88 Ill. 58, 62; *S. C.* 7 Cent. L. J. 234.

² *In re Burrows*, 7 Biss. 526; *S. C.* 5 N. Y. Week. Dig. 137; 6 Am. L. Rec. 203; *Mobley v. Letts*, 61 Ind. 11. In this case, the phrase, "with the privilege of using the same," was construed to mean a power to sell and dispose of the stock. See *Jordan v. Turner*, 3 Blackf. 309. And see *New Albany Ins. Co. v. Wilcoxson*, 21 Ind. 355, cited in the foregoing case, and also relied upon as indicating the law in *Indiana*, by Judge Davis, in *Robinson v. Elliott*, 22 Wall. 513; *Jordan v. Turner*, 3 Blackf. 309; *Maple v. Burnside*, 22 Ind. 139.

³ 22 Wall. 513. "We are not prepared," said Mr. Justice Davis, "to say that a mortgage under the *Indiana* statute would not be sustained, which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. In-

deed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors. But there are features engrafted upon this mortgage which are not only to the prejudice of the creditors, but which show that other considerations than the security of the mortgagees, or their accommodation even, entered into the contract. Both the possession and right of disposition remain with the mortgagors. They are to deal with the property as their own, sell it at retail, and use the money thus obtained to replenish their stock. There is no covenant to account with the mortgagees, nor any recognition that the property is sold for their benefit. Instead of the mortgage being directed solely to the *bonâ fide* security of the debts then existing, and their payment at maturity, it is based on the idea that they may be indefinitely prolonged."

the goods as their own and appropriate the proceeds to their own purposes ; and this, too, for an indefinite length of time. Such a mortgage, in the opinion of the court, is objectionable, as being no security to the mortgagees, and as operating to ward off other creditors ; and as the instrument on its face shows that the legal effect of it is to delay creditors, the law imputes to it a fraudulent purpose.

Even a provision in a mortgage by a silversmith of fixtures and merchandise in his shop, reserving the privilege until default to keep possession of the property, "and to use and enjoy the same," was held to make the mortgage void on its face as to merchandise embraced in it, it being apparent from the nature of the property that the only reasonable use the mortgagor could make of it was to sell it. But as to the fixtures embraced in such mortgage, the mortgage was held valid, because these articles were such as are of permanent use in a silversmith's shop, and are not ordinarily kept for sale, and therefore the reservation of the right to use and enjoy did not necessarily carry with it by implication the right on the part of the mortgagor to sell and convert those articles to his own use. The mortgage may be void in part and good as to the residue.¹

But the latest decisions of the Supreme Court of this state upon this point change the rule which was previously supposed to prevail. Upon the ground that the question of fraudulent intent is by statute declared to be a question of fact,² it is held that fraudulent intent cannot be judicially inferred, merely because the mortgagor remains in possession with leave to sell the property, and account to the mortgagee for the proceeds, or even if he is not required so to account,³ in the absence of proof of an agreement that the mortgagor was to apply the proceeds of sales to his own use, or that he has done so, in fact, with the mortgagee's knowledge.⁴ When the mortgagor is authorized to dispose of the mortgaged property substantially for his own benefit, either a

¹ *Davenport v. Foulke*, 68 Ind. 382 ; 10 Cent. L. J. 427. But in *Burrows, in re*, 7 Biss. 526 ; *S. C.* 5 N. Y. Week. Dig. 137, it was held that the objectionable provision, although it applies only to a stock of goods, makes the entire mortgage absolutely void, as where it embraces fixtures to which this provision could not apply.

² 1 R. S. 1876, p. 506 ; R. S. 1881, § 4924 ; *Morris v. Stern*, 80 Ind. 227 ; *McFadden v. Fritz*, 90 Ind. 590.

³ *Fisher v. Syfers*, 109 Ind. 514 ; 10 N. E. Rep. 306 ; *Muncie Nat. Bank v. Brown* (Ind.), 14 N. E. Rep. 358.

⁴ *New v. Sailors* (Ind.), 16 N. E. Rep. 609.

secret or an open trust in the property is created in his favor, and the mortgage is fraudulent under the statute.¹

The mortgage in one case was of a brick-yard and a kiln of brick. After the maturity of the debt the mortgagee authorized the mortgagor to sell the brick, and the mortgagor had already sold a part when a judgment creditor levied an execution upon the mortgaged property, claiming that the mortgage was fraudulent and void in its inception, or that it became so by reason of the mortgagee's subsequently permitting the mortgagor to dispose of the property at his pleasure.²

The question of fraudulent intent is a question of fact, and not of law. Until the contrary appears it is presumed that a mortgagor who is permitted to sell mortgaged property does so under an agreement to account, as agent of the mortgagee; and the proceeds will be regarded as applied to the liquidation of the mortgage debt, whether they have been actually paid over or not.³

¹ *Mayer v. Feig* (Ind.), 17 N. E. Rep. 159; *Muncie Nat. Bank v. Brown*, 112 Ind. 474; 14 N. E. Rep. 358.

² *McLaughlin v. Ward*, 77 Ind. 383, 387. The court say: "Under this statute any recorded mortgage, which is valid between the parties to it, will be upheld against third parties, unless, for some reason, it is actually fraudulent as against them; and whether fraudulent, must be deemed a question of fact, to be determined according to the circumstances of the particular case. If the debtor has no other creditor besides his mortgagee, or if he has within the jurisdiction of the court other leviable property, ample to satisfy all his liabilities, and no actual fraud was intended, or could possibly result, it is clear that the instrument could not be annulled on account of any supposed constructively fraudulent character of the contract or intention on the part of the mortgagor." In *Morris v. Stern*, 80 Ind. 227, the court said: "The mere fact that, by the stipulations of a mortgage on a stock of goods, or by agreement between the parties thereto, the mortgagor is authorized to sell the goods

at retail, or remove them to another town in an adjoining county for the purpose of such sale, will not invalidate or avoid the mortgage, or render it fraudulent as to other creditors of the mortgagor. Fraud or fraudulent intent is a question of fact, which cannot be presumed, but must be averred and proved." To same effect, *Overman v. Quick*, 8 Biss. 134; *Lockwood v. Harding*, 79 Ind. 129. The latter case related to a mortgage of a stock of goods which the mortgagor was allowed to sell at retail.

³ *New v. Sailors* (Ind.), 16 N. E. Rep. 609. "We cannot hold that a provision in a chattel mortgage vesting the right of disposition in the mortgagee vitiates the mortgage, for our statute and our decisions declare a very different rule." Per *Elliott, J.*, in *Muncie Nat. Bank v. Brown*, *supra*. And see *McFadden v. Hopkins*, 81 Ind. 459; *Louthain v. Miller*, 85 Ind. 161; *Berghoff v. McDonald*, 87 Ind. 549; *McFadden v. Fritz*, 90 Ind. 590; *Dessar v. Field*, 99 Ind. 548; *Stix v. Sadler*, 109 Ind. 254; 9 N. E. Rep. 905.

388. In Iowa a chattel mortgage which allows the mortgagor to retain possession and dispose of the mortgaged goods is neither fraudulent in law nor presents a badge of fraud.¹ The question of invalidity on the ground of fraud is a question of fact, to be determined in each case upon all the facts attending the transaction.² The burden is upon the party claiming that the mortgage is fraudulent to establish its invalidity.³ The fact that the mortgagor is not required by the terms of the mortgage to account to the mortgagee for the proceeds of sales made by the former does not render the mortgage invalid.⁴

If, however, by reason of sales, the mortgaged stock is being depreciated materially in value, and the proceeds of sales are used solely for the benefit of the mortgagor, these facts justify a finding by the jury that the mortgage was intended as a means of warding off other creditors, and that it is fraudulent in fact.⁵ Where the facts show that there is no real debt due from the mortgagor to the mortgagee, or that the amount is knowingly overstated for the purpose of deceiving creditors, or that the con-

¹ *Fromme v. Jones*, 13 Iowa, 474; *Wilhelmi v. Leonard*, *ib.* 330; *Smith v. McLean*, 24 Iowa, 322; *Torbert v. Hayden*, 11 Iowa, 435; *Hughes v. Cory*, 20 Iowa, 399; *Adler v. Clafin*, 17 Iowa, 89; *Kuhn v. Graves*, 9 Iowa, 303; *Campbell v. Leonard*, 11 Iowa, 489; *Clark v. Hyman*, 55 Iowa, 14; 7 N. W. Rep. 386; *Sperry v. Etheridge*, 63 Iowa, 543; 19 N. W. Rep. 657; *Jaffrey v. Greenebaum*, 64 Iowa, 492; 20 N. W. Rep. 775; *Meyer v. Evans*, 66 Iowa, 179; 23 N. W. Rep. 386; *Meyer v. Gage*, 65 Iowa, 606; 19 N. W. Rep. 892; *Argall v. Seymour*, 4 McCrary, 55.

² *Lyon v. Council Bluffs Sav. Bank*, 29 Fed. Rep. 566, 572. See, also, *Maish v. Bird*, 22 Fed. Rep. 576; *Crooks v. Stuart*, 7 Fed. Rep. 800.

³ *Maish v. Bird*, *supra*.

⁴ *Clark v. Hyman*, 55 Iowa, 14, 21; 7 N. W. Rep. 386. "From an examination of the case of *Hughes v. Cory*, *supra*, it will appear that the fact that the mortgagor had agreed to account to Cory, the mortgagee, for thirty-three per cent. of the proceeds of the sales was not regarded as a circumstance favorable to the validity of

the transaction. Upon the contrary, the court proceeded to show that the transaction was valid, not because of, but notwithstanding, the provision; saying: 'Nor do we see that the mortgage, in the sense prohibited by the law, reserves an interest in or secures a benefit to the mortgagor at the expense of his other creditors. If he had agreed to apply all the proceeds to the payment of Cory's debt, or if Cory had taken an instrument letting him into the immediate possession, with a right to receive all the proceeds, the other creditors would have been in a worse condition than they were by the instrument as it was, and yet this would, under the decisions of this court, have been valid.'" To like effect, see *Meyer v. Evans*, *supra*; *Jaffrey v. Greenebaum*, *supra*; *Sperry v. Etheridge*, *supra*.

All the subsequent cases refer to the case of *Hughes v. Cory* fully, as the case which fully and authoritatively construes the law of the subject. *Lyon v. Council Bluffs Sav. Bank*, *supra*, per *Shiras, J.*

⁵ *Lyon v. Council Bluffs Sav. Bank*, *supra*; *Jaffrey v. Greenebaum*, *supra*.

trolling motive in making the mortgage was to hold it as a shield for the protection of the debtor against other creditors, the facts being proven, the court is bound to instruct the jury that fraud is the necessary legal inference.¹

389. Kansas. — A mortgage upon a stock of goods, with a stipulation that the mortgagor shall remain in possession, and accompanied by a subsequent agreement outside the mortgage that the mortgagor may continue to dispose of the goods in the ordinary course of business, and use a portion of the proceeds for the support of his family, paying the remainder over in discharge of the mortgage debt, is not fraudulent and void as against creditors and subsequent purchasers, but will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not.² “The mortgagor, if he keep the possession, may as well make the sales as a stranger. He acts in that respect as a *quasi* agent at least of the mortgagee, and as such agent and salesman is entitled to compensation for his services. Doubtless such arrangements are liable to abuse, and should always be closely scanned; but still they are not absolutely and in all cases to be adjudged void as matter of law.”³

The mortgagor is not obliged to account to the mortgagee for the proceeds of sales, or to apply the same in liquidation of the mortgage debt.⁴

390. In Kentucky a mortgage which permits the mortgagor to retain possession, and sell and replenish the stock in his hands in the ordinary course of business, without accounting to the mortgagee, is not fraudulent *per se*. Such a mortgage may wear a badge of fraud; but it is not such evidence of meditated fraud on the part of the mortgagor as is requisite to establish an alle-

¹ *Lyon v. Council Bluffs Sav. Bank*, 29 Fed. Rep. 566.

² *Frankhouser v. Ellett*, 22 Kans. 127, 150; *S. C.* 31 Am. R. 171, and note. Horton, C. J., dissenting, said: “With such a license in force, the so-called mortgage resolves itself merely into personal security. The power granted to the mortgagor by the mortgagee enables the latter to defeat the provisions of the instrument. For the time being, the exercise of this

power destroys it. It is completely *felo de se*.

³ *Frankhouser v. Ellett*, *supra*, per Brewer, J.; affirmed in *Howard v. Wulfekuhler*, 13 Pac. Rep. 566, and in *Howard v. Rohlzing*, 36 Kans. 357. See, also, *Cameron v. Marvin*, 26 Kans. 612, 625.

⁴ *Howard v. Wulfekuhler*, *supra*. The case of *Leser v. Glaser*, 32 Kans. 546, 4 Pac. Rep. 1026, to the contrary, is repudiated.

gation, by an attaching creditor, of a sale of his property with the fraudulent intention of hindering and delaying his creditors.¹ Neither is an attempt to make a mortgage embrace subsequently acquired property, though ineffectual, and perhaps prejudicial to creditors as presenting an apparent obstacle to the enforcement of their legal remedies, any reason for declaring the mortgage void.²

391. In Maine the question of fraud in a mortgage which allows the mortgagor to retain possession of the property, and to dispose of it, is one for the jury to determine from all the evidence in the case.³ And so a mortgage of perishable goods, such as a stock of groceries, meats, fruits and vegetables, which provides that the mortgagor may remain in possession for a year, is not necessarily fraudulent. The character and condition of the goods are only matters to be considered by the jury in determining whether there was fraud in fact.⁴

A mortgage duly recorded cannot be pronounced fraudulent upon its face because it covers property of a manufacturing company, and provides that the company may retain possession, and manufacture and sell their goods, even if it stipulates that such possession shall continue beyond the time when the debt becomes due; provided such possession is not inconsistent with the security of the mortgagee.⁵ If there be mingled in the contract an intention to delay or defraud other creditors, or to protect the property from them beyond what may be necessary for the security of the mortgagee, the contract will be deemed to be fraudulent and void. If, by its terms, it is to continue a great number of years, this might be deemed evidence of a fraudulent intention; but a stipu-

¹ *Ross v. Wilson*, 7 Bush, 29. In *Enders v. Williams*, 1 Metc. 346, 352, it was said that the tendency of modern decisions in this as well as in the courts of most of the other states has been to leave the question of fraud open to investigation, to be determined by all the facts which tend to show the actual intention with which the conveyance was executed; and in *Daniel v. Morrison*, 6 Dana, 182, 185, the doctrine of *per se* fraud was characterized as arbitrary and inconsistent with the harmony of legal science. Both

quoted with approval in *Vanmeter v. Estill*, 78 Ky. 456; *S. C.* 12 Chicago L. N. 375.

² *Ross v. Wilson*, *supra*.

³ *Stedman v. Vickery*, 42 Me. 132. And see *Brown v. Thompson*, 59 Me. 372; *Melody v. Chandler*, 12 Me. 282; *Abbott v. Goodwin*, 20 Me. 408; *Allen v. Goodnow*, 71 Me. 420. And see *Deering v. Cobb*, 74 Me. 332.

⁴ *Googins v. Gilmore*, 47 Me. 9.

⁵ *Brinley v. Spring*, 7 Me. 241.

lation that the mortgagor may continue in possession of a large manufacturing business for five years is not to be so regarded.

392. In Maryland, while a mortgage of goods in a store does not, at law, as against a creditor of the mortgagor, cover renewals and substitutions for such goods, the mortgage is valid as to such goods as were in the store at the time of the mortgage. Where the mortgagee sues for the taking of the goods by a creditor, the burden is upon him to show that the goods seized were on the premises at the date of the mortgage.¹ No question seems to have been made as to any fraud in such transaction. It seems that a mortgage may create a valid lien in equity upon subsequently acquired property.²

393. In Massachusetts a mortgage of a trader's stock is not necessarily fraudulent because it provides that, until condition broken, he may remain in possession, and sell and dispose of the goods.³ It may well be that such a mortgage was made with no other than an honest purpose of securing the mortgagee. It may happen that the mortgaged stock much exceeds in value the debt for which security is required, and the creditor might be willing to consent to the disposition of a part of the goods mortgaged, being satisfied that the goods remaining would furnish an adequate security.⁴

A mortgage of property consisting in part of groceries and provisions, conditioned that the mortgagor shall not, except with the consent in writing of the mortgagee, sell or remove the same from the building in which it is situated, is not necessarily given in fraud of creditors because it also provides that the mortgagor may retain possession of the mortgaged property, and use and enjoy the same; nor can the consent of the mortgagee that the mortgagor might sell and consume the property be inferred. So far as there is any evidence of an arrangement in fraud of creditors, the question of fraud should be submitted to the jury. All the

¹ *Hamilton v. Rogers*, 8 Md. 301; *Rose v. Bevan*, 10 Md. 466; *Preston v. Leighton*, 6 Md. 88.

² *Triebert v. Burgess*, 11 Md. 452; *Butler v. Rahm*, 46 Md. 541.

³ *Jones v. Huggefords*, 3 Met. 515;

Briggs v. Parkman, 2 Met. 258; *Barnard v. Eaton*, 2 Cush. 294; *Cobb v. Farr*, 16 Gray, 597; *Rowley v. Rice*, 11 Met. 333; *Fletcher v. Powers*, 131 Mass. 333; *Blanchard v. Cooke*, 144 Mass. 207.

⁴ *Jones v. Huggefords*, *supra*.

facts surrounding the transaction are to be taken into account collectively.¹

Articles in their nature consumable by use may be mortgaged without any imputation of fraud, provided they are not to be used, and are kept without damage until the mortgage debt shall become payable; but if the articles mortgaged are perishable and cannot be so kept, or if they are mortgaged under an agreement or understanding that they may be used and consumed by the mortgagor, the transaction must be considered as collusive and fraudulent against creditors. Thus, if a mortgage of all the hay, grain, and produce growing on a farm be given to secure the payment of a sum of money due in a year, and the mortgagor, with the knowledge of the mortgagee, and without objection on his part, uses and consumes the property in the same manner as he would have done if no mortgage had been given, the inference is that the mortgage is colorable and fraudulent against his creditors.² An agreement that in case the mortgagor should make large sales of the mortgaged goods, he would add to the mortgagee's security by other property, may tend to repel an inference of fraud arising from such a mortgage.³ But the intention of the parties, and the circumstances attending the transaction, may always be shown in order to repel a presumption of fraud. Whether, in any case, fraud exists is to be decided on the whole evidence.⁴ Whenever the terms and stipulations of a contract are by possibility compatible with good faith, and have upon the face of them the essential elements of a legal contract, the question of fraudulent intent and want of good faith is to be submitted to the jury. The supposed badges of fraud are open to explanation, and may be shown to be consistent with honesty of purpose and good faith in the parties.⁵

394. In Michigan a mortgage of a stock of goods, which leaves the mortgagor in possession, with authority to sell the same in the

¹ *Sleeper v. Chapman*, 121 Mass. 404; *Briggs v. Parkman*, 2 Met. 258. And see *Cobb v. Farr*, 16 Gray, 597.

² *Robbins v. Parker*, 3 Met. 117.

³ *Briggs v. Parkman*, *supra*.

⁴ *Homes v. Crane*, 2 Pick. 607.

⁵ *Jones v. Huggefurd*, 3 Met. 515, per Dewey, J. And so if a mortgagee takes

possession of the mortgaged property after default, and then puts the mortgagor back in possession with authority to go on and sell and remit the proceeds, the transaction is not necessarily fraudulent. *Cotton v. Marsh*, 3 Wis. 221; *Smith v. Waggoner*, 50 Wis. 155; *S. C.* 6 N. W. Rep. 568.

usual course of business, is good between the parties, and is not fraudulent on its face as against the mortgagor's creditors.¹ The question of fraud is one to be determined by the jury, from all the circumstances of the case bearing upon the good faith of the transaction. Each case is considered by itself, and stands upon its own merits. A mortgage of a stock of goods in a store, which is otherwise valid, is not rendered void by a proviso that the mortgagor "shall be allowed to continue the sale of goods from said store as though this instrument was not made." This clause simply authorizes sales in the ordinary course of business, and mortgages reserving such a power to the mortgagor have uniformly been held valid in this state.²

The decisions go still farther, and make valid and effectual a mortgage of goods which, in terms, covers subsequent purchases. Thus, a mortgage of a stock of goods, which permitted the mortgagor to sell in the ordinary course of trade, and required him to keep his stock of like goods to a specified amount as security to the mortgagee, was held to cover goods so purchased and added to the stock.³

395. In Minnesota a chattel mortgage, not followed by an immediate delivery and continued change of possession of the mortgaged property, is absolutely void as against the creditors of the mortgagor and purchasers in good faith, unless it appears both that the mortgage was made in good faith, without the purpose of defrauding any creditor, and that the mortgage was duly filed.⁴ Want of continued change of possession makes the mortgage *primâ facie* fraudulent.⁵ Unlike the statutes of some other states, the filing of the mortgage is not made legally equivalent to actual delivery and continued change of possession, but it merely adds another to the grounds on which the mortgage will be declared void.⁶ If a mortgage provide that the mortgagor may retain pos-

¹ People's Sav. Bank v. Bates, 120 U. S. 556; 7 Sup. Ct. Rep. 679; Morse v. Riblet, 22 Fed. Rep. 501; Hills v. Furniture Co. 23 Fed. Rep. 432; Gay v. Bidwell, 7 Mich. 519; Oliver v. Eaton, 7 Mich. 108; People v. Bristol, 35 Mich. 28; Fry v. Russell, 35 Mich. 229.

² Winger v. Sibley, 35 Mich. 231.

³ Leland v. Colver, 34 Mich. 418.

⁴ 2 Stats. at Large (1873), p. 714; Laws 1860, ch. 23; Lienau v. Moran, 5 Minn. 482. And see Marsh v. Armstrong, 20 Minn. 81.

⁵ Byrnes v. Braley, 6 Reporter, 688; Brayley v. Byrnes, 25 Minn. 297.

⁶ Horton v. Williams, 21 Minn. 187, per Young, J.

session of the property and sell it as his own, without satisfaction of the mortgage debt, it is regarded as necessarily fraudulent and void as against the mortgagor's creditors.¹ If the intent that the mortgagor may retain possession of the goods and dispose of them as owner is apparent in the mortgage itself, the existence of such intent is to be determined by the court; otherwise the existence of the intent is a question for the jury, upon the evidence. But in every case, if the intent is found to exist, the law declares the mortgage fraudulent.² If, before any creditor takes proceedings hostile to such mortgage, the mortgagor, in good faith, part of the mortgage debt being due, delivers the property to the mortgagee, for the purpose of having it applied in payment of the debt, and authorizes the sale of the property for that purpose, the mortgagee's title becomes complete and valid against any creditor subsequently proceeding against the mortgage.³ But it is not in the power of such mortgagee to remove the original taint of the mortgage by taking possession of the property under and by virtue of the mortgage.⁴ In the Circuit Court of the United States for the District of Minnesota, it was held that a clause in a chattel mortgage which constituted the mortgagor the agent of the mortgagee to dispose of the mortgaged goods and account for their proceeds, with no right or power to sell for his own use, is not inconsistent with the statutes of the state, and does not render the mortgage fraudulent on its face.⁵

But if the mortgage contains a stipulation for the application of the proceeds of sales directly to the mortgage debt, it is not deemed fraudulent in law.⁶

396. In Mississippi it is settled that when the mortgage deed does not in terms provide that the mortgagor may retain posses-

¹ *Chophard v. Bayard*, 4 Minn. 533; *First Nat. Bank v. Anderson*, 24 Minn. 435; *Stein v. Munch*, 24 Minn. 390; *Mann v. Flower*, 25 Minn. 500, 507; *Bannon v. Bowler*, 34 Minn. 416.

² *Gere v. Murray*, 6 Minn. 305; *Horton v. Williams*, 21 Minn. 187.

³ *First Nat. Bank v. Anderson*, *supra*.

⁴ *Stein v. Munch*, *supra*; *Blakeslee v. Rossman*, 44 Wis. 550; *Wells v. Langbein*, 20 Fed. Rep. 183.

⁵ *Hawkins v. Hastings Bank*, 1 Dill. 462, citing *Conkling v. Shelley*, 28 N. Y. 360.

⁶ *Bannon v. Bowler*, *supra*. "The debt is diminished as sales are made, the proceeds of which go to the mortgagee, and not to the mortgagor; and it is immaterial whether the mortgage debt be so satisfied through sales made by the mortgagee, or for him through the agency of the mortgagor." Per Vanderburgh, J.

sion of the mortgaged stock of goods and sell them, but the mortgagee permits him to dispose of them, the deed is not *per se* fraudulent and void.¹ The reservation to the mortgagor of the right to deal with the property mortgaged as his own must be so expressly made that evidence to the contrary would be excluded as contradicting the writing, to warrant a court in declaring the mortgage fraudulent on its face because of such reservation.² A trust deed of a stock of goods, which permitted the mortgagor to remain in possession until default, but did not expressly confer upon him a power of sale, although it provided that upon default he should deliver possession of so much of the stock as might then be on hand, to be sold by the trustee in satisfaction of the debt secured, was adjudged not to be void upon its face.³ The fact that the goods were sold with the mortgagee's consent may be a circumstance from which a jury might infer fraud, and may make the mortgage *primâ facie* fraudulent; or the disposal of the goods may have been innocently or carelessly made, without any intention on the part of either of the contracting parties to defraud any creditor. The question whether there was a fraudulent intent in such case is a question for the jury alone.⁴ Moreover, even a mortgage which provides that the mortgagor may retain possession, and continue to use and have the right to dispose of the goods mortgaged until the mortgagee shall take possession, is voidable only by those creditors who obtain liens upon the property before the mortgagee in fact takes possession.⁵ A mortgage of property, the use of which involves its consumption, is not in itself fraudulent, unless the use of it is expressly reserved in the deed. The intention of the parties in making the instrument may be shown to have been without fraud. The fact of the mortgagor's possession of such property, and use of it, with the consent of the mortgagee, is only evidence upon the question of fraudulent intent.⁶

¹ *Hitchler v. Citizens' Bank*, 63 Miss. 403; *Britton v. Criswell*, 63 Miss. 394.

² *Britton v. Criswell*, *supra*; *Hitchler v. Citizens' Bank*, *supra*.

³ *Summers v. Roos*, 42 Miss. 749; *Hilliard v. Cagle*, 46 Miss. 309.

⁴ If there is no reservation to the mortgagor of a power of disposal in the deed itself, but it appears by evidence *aliunde*

that there was an understanding between the mortgagor and mortgagee that the former should continue to deal with the mortgaged property virtually as his own, the mortgage is fraudulent in fact. *Britton v. Criswell*, *supra*.

⁵ *Summers v. Roos*, *supra*.

⁶ *Ewing v. Cargill*, 13 Smed. & M. 79; *Farmers' Bank v. Douglass*, 11 Smed. & M. 469.

But a mortgage which conveys an entire stock of goods on hand and all goods which the mortgagor may during the continuance of the mortgage add thereto, and all notes and accounts and other forms of credit for which such goods may be sold, and which provides also that the mortgagor may remain in possession and carry on the business, is fraudulent as to creditors. Such a mortgage contemplates that the business shall be continued in the customary way of buying and selling, and that it shall attach to the substituted goods and to the accounts for the goods sold; and its effect is to exclude other creditors from intermeddling during the term of the mortgage, and consequently to hinder and delay them. This intent being deduced from a construction of the instrument, without inquiring into or finding any fact outside of it, the mortgage is invalid in law.¹ A trust deed which allows the grantor to retain possession and sell and replenish the goods in the usual course of business is fraudulent and void, although it contains a stipulation for the rendering of monthly accounts to the trustee, and the payment to him of the money received, to be applied, under his direction, to the payment of the current expenses of the business, and to replenishing the stock. The money is not to be applied to the discharge of the debt, but is to be kept in the business; and therefore the instrument is not to be distinguished from those that have been held to be void.²

397. In Missouri a mortgage of a trader's or manufacturer's stock in trade, which on its face permits the mortgagor to remain in possession for the purpose of carrying on his business and selling the goods in the usual manner for his own benefit, is regarded as fraudulent and void as against existing and subsequent creditors and purchasers. Such a mortgage is declared to be in effect a conveyance to the mortgagor's own use.³ Although the instrument does not expressly provide that the mortgagor shall remain in possession, and continue to dispose of the goods in the usual course of his business, it is sufficient to avoid it if it appears, from

¹ *Harman v. Hoskins*, 56 Miss. 142.

² *Joseph v. Levi*, 58 Miss. 843.

³ *Lodge v. Samuels*, 50 Mo. 204; *Bulene v. Barrett*, 87 Mo. 185; *Armstrong v. Tuttle*, 34 Mo. 432; *Brooks v. Wimer*, 20 Mo. 503; *Martin v. Maddox*, 24 Mo. 575; *Martin v. Rice*, 24 Mo. 581; *Reed v. Pel-*

letier, 28 Mo. 173; *White v. Graves*, 8 Cent. L. J. 177; *S. C.* 68 Mo. 218; *Cator v. Collins*, 2 Mo. App. 225, 234; *Thompson v. Foerstel*, 10 Ib. 290; *State v. Mueller*, 10 Mo. App. 87; *Moser v. Claes*, 23 Mo. App. 420.

a consideration of the whole instrument, that such was necessarily the intent of the parties.¹ But when by the terms of the instrument the mortgagor is not permitted to dispose of the goods for his own use, but is required to apply the proceeds to the discharge of the debt secured by the mortgage, the mortgage is not void as being for the use of the mortgagor.² Moreover, the agreement for the disposal of the goods for the mortgagor's own use, to render the mortgage fraudulent in law, must appear on the face of the deed, either in express terms or by necessary implication.³ If this does not appear on the face of the mortgage, it is the duty of the court to submit to the jury for its determination the question whether the impeaching facts are true, and to direct that, if they are established to their satisfaction, they will find the conveyance void as to creditors.⁴ The mere fact that the mortgagor, without such express agreement, subsequently sells the property and appropriates the proceeds, is no evidence of the intention of the parties that he should do so.⁵ The language of a mortgage covering goods in a store, or "which may be added from time to time to said stock," does not necessarily tend to the conclusion that the mortgagor was to sell the goods, or to make purchases to replenish the stock;⁶ nor is such conclusion to be drawn from a clause in a mortgage of a manufacturing establishment, that it

¹ *Stanley v. Bunce*, 27 Mo. 269; *Bilingsley v. Bunce*, 28 Mo. 547; *White v. Graves*, 68 Mo. 218; *Re Kirkbride*, 5 Dill. 116; *Goddard v. Jones*, 78 Mo. 518.

² *Hubbell v. Allen*, 90 Mo. 574; *Metzner v. Graham*, 57 Mo. 404; *Thompson v. Foerstel*, 10 Mo. App. 290. But, in an earlier case, an agreement to apply proceeds of sales to replenishing the stock was held not to validate the instrument. *Walter v. Wimer*, 24 Mo. 63.

³ *Millburn v. Waugh*, 11 Mo. 369; *Hewson v. Tootle*, 72 Mo. 632; *Bullene v. Barrett*, 87 Mo. 185. The mortgage in the latter case described the goods as being "now kept and offered for sale" at a certain place, and in terms was to extend to and include any goods which the mortgagor might add to the stock. It was held that there was no necessary inference that a power of disposal was given to the mortgagor.

⁴ *Bullene v. Barrett*, *supra*; *Petring v. Chrisler*, 90 Mo. 649; *Nicholson v. Golden*, 27 Mo. App. 132. A mortgage of a stock of goods which also includes all articles that might thereafter be added thereto, or which should be on hand at the time the mortgagee should claim possession, does not authorize the mortgagee to sell any of the stock. *St. Louis Drug Co. v. Robinson*, 81 Mo. 18.

⁵ *Thompson v. Foerstel*, *supra*; *Hewson v. Tootle*, *supra*.

⁶ *Voorhis v. Langsdorf*, 31 Mo. 451; *State v. D'Oench*, 31 Mo. 453; *Thompson v. Foerstel*, *supra*; *St. Louis Drug Co. v. Robinson*, *supra*. See, however, *State v. Jacob*, 2 Mo. App. 183, that a contemporaneous parol agreement that the mortgagor may dispose of the goods will vitiate the deed, with like effect as if it appeared on the face of the instrument.

should cover, "also, all property, goods, tools, wares, materials, fixtures, machinery, stock, rough or finished materials, and all things whatever, now or that may be hereafter used, bought, or belong to the said party of the first part, in the course of his usual trade or business."¹ The court will not hear extrinsic evidence to the effect that the parties intended that the mortgagor should continue to make sales in the usual course of business, and on such evidence, as a matter of law, pronounce the mortgage void. Neither will the court imply a power of sale in the mortgagor from the nature of the mortgaged goods; as for instance, the power will not be implied because the mortgage is made by a firm of druggists of "all their stock of drugs and fixtures contained in their drug store."² Therefore such mortgages are not void in law, but questions of fraud arising upon them are for the jury.³ Though a mortgage be void as to part of the property covered by it, on account of a power of disposal retained by the mortgagor over such part, it may be valid as to other property embraced in it.⁴

397 a. Montana Territory. — A mortgage of a stock of goods, which provides that the mortgagor may continue to sell the goods in the usual course of trade, accounting to the mortgagee as he

¹ *State v. Tasker*, 31 Mo. 445; *Voorhis v. Langsdorf*, 31 Mo. 451.

² *Weber v. Armstrong*, 70 Mo. 217. It appeared from the terms of the mortgage that the mortgagor was to remain in possession; but there was not a syllable in the instrument, say the court, from which it could be fairly implied, much less from which it must necessarily be implied, that the mortgagor was to have the power to sell. "We are not unmindful of the fact that the property conveyed was merchandise which was purchased and held, up to the date of the mortgage, for the purpose of being sold. This fact, however, cannot vary the interpretation of the deed. It may give rise to conjecture; but, as was observed by Judge Napton in the case of *Voorhis v. Langsdorf*, *supra*, courts are not warranted in pronouncing deeds to be void upon conjecture merely." Under the registry act personal property of every character may be safely left in the possession of the grantor. "No exception is

made by the statute, and this court has no power to create one. No matter what may be the character of the property or the business of the grantor, the very stipulations of the deed that the property shall be held to secure the debt, and that upon default in payment the mortgagee may take possession thereof and sell the same, are in effect stipulations that the grantor will not sell it; and unless there are other provisions in the deed expressly authorizing the grantor to sell, or from which it must necessarily be implied that he has a power to sell, the deed cannot be held void upon its face." *Overruling Lodge v. Samuels*, 50 Mo. 204.

³ *Hewson v. Tootle*, 72 Mo. 632; *Johnson v. McAllister*, 30 Mo. 327; *Nicholson v. Golden*, 27 Mo. App. 132.

⁴ *Bullene v. Barrett*, 87 Mo. 185; *State v. Tasker*, *supra*; *Donnell v. Byern*, 69 Mo. 468; *Re Kirkbride*, 5 Dill. 116. See, *contra*, *Russell v. Winne*, 37 N. Y. 591.

may request, is fraudulent and void, if it appears that the mortgagor with the mortgagee's consent received the proceeds of a portion of the sales.¹

398. In Nebraska the statute concerning fraudulent conveyances provides, that unless there be immediate delivery and continued possession of the property, the mortgage is presumed to be fraudulent and void against creditors of the mortgagor and subsequent purchasers in good faith; and is conclusively fraudulent unless it be made to appear that it was made in good faith, without any intent to defraud such creditors or purchasers.² Under this statute, if the mortgage be duly recorded, the retention of possession by the mortgagor is *primâ facie* presumption of fraud which might be overcome by competent testimony; but if no evidence of good faith is produced, this presumption becomes conclusive as to creditors and *bonâ fide* purchasers.³ Consequently, a mortgage of a stock of goods which the mortgagor retained possession of, and disposed of in the usual course of business, was held to be void.⁴ But a mortgage which does not in terms, or by necessary implication, allow the mortgagor to dispose of the mortgaged property, but merely provides that the mortgagor may retain the use of the property, is not fraudulent in law; but the question of fraudulent intent in making it is a question of fact, which must be submitted to the jury. The court cannot look beyond the instrument in pronouncing it fraudulent.⁵ Although the property mortgaged be in part a stock of goods, a provision in the mortgage that the mortgagor may retain possession, and use and enjoy the same until default, does not render it void on its face. The

¹ Leopold v. Silverman (Mont.), 16 Pac. Rep. 580. This case follows the case of Robinson v. Elliott, 22 Wall. 513, which was decided with reference to what was supposed to be the local law of the State of Indiana when the case arose. The later decisions in that state have repudiated the earlier decisions which Robinson v. Elliott followed; and the recent case of People's Sav. Bank v. Bates, 120 U. S. 556, 7 Sup. Ct. Rep. 679, takes away much of the force of Robinson v. Elliott as a general authority.

² Comp. St. ch. 32, § 11.

³ Pyle v. Warren, 2 Neb. 241; Bruns-

wick v. McClay, 7 Neb. 137; Marsh v. Burley, 13 N. W. Rep. 279; Turner v. Killian, 12 Neb. 580.

⁴ Tallon v. Ellison, 3 Neb. 63.

⁵ Williams v. Evans, 6 Neb. 216. If the mortgagor, without any agreement in the mortgage allowing him to dispose of the goods in the usual course of trade, transfers a small part of the mortgaged goods to a third person in payment of a debt, with the consent of the mortgagee, the mortgage is not thereby rendered fraudulent and void as against creditors. Chicago Lumber Co. v. Fisher, 18 Neb. 334.

question of intent, in such case, must be submitted to the jury.¹ Although a mortgage of a stock of goods which provides that the mortgagor may sell, in the ordinary course of trade, is void upon its face as to the mortgagor's creditors and purchasers from him in good faith, it is valid between the parties;² and is also valid as against one who purchases the entire stock of goods with the intent to hinder and delay creditors, although the mortgage be not recorded until after the pretended purchase.³

In a recent case it appeared that a bill of sale of a stock of goods was made in form of an absolute sale, but with a verbal defeasance, so that the transaction was really a mortgage. The mortgagor was left in possession, and continued to sell the goods. At the trial the judge charged the jury that, if they found there was no actual and *bonâ fide* change of ownership, but the transaction was intended to prevent the grantor's creditors from taking the goods, the grantee could not recover. The Supreme Court, however, said that this instruction was not applicable to the facts proven in the case, as there was no evidence tending to prove that the bill of sale was given for any such purpose. The mortgagor sold the goods to a creditor of his own in payment of a debt; but inasmuch as the purchaser was chargeable with notice of the fact that the transaction was a mortgage, he acquired no title by the purchase. The court said that from the mortgagor's remaining in possession and continuing to sell the goods, the public had a right to presume he had authority for such sales from the mortgagee; but the purchaser in this case had no right to presume authority on his part to sell the mortgaged goods at wholesale to pay his own debt, and such sale would convey no title.⁴

The latest decisions in this state seem to overrule some of the earlier decisions on this subject. The statute of frauds provides that the question of fraudulent intent shall be deemed a question of fact, and not of law; and therefore the question whether a mortgage which gives the mortgagor possession of the property with the power to sell it in the usual course of trade for the payment of the debt was given with fraudulent intent is, in all cases, one of fact, and must be raised by suitable pleading, so that an

¹ Hedman v. Anderson, 6 Neb. 392.

² Gregory v. Whedon, 8 Neb. 373.

Gregory v. Whedon, *supra*.

⁴ Omaha Book Co. v. Sutherland, 10 Neb. 334; S. C. 6 N. W. Rep. 63.

issue can be framed and the question submitted to a jury.¹ There may be a presumption of fraud, but this presumption is not conclusive.²

399. In New Hampshire a mortgage of a stock of goods in a store, or of a manufacturer's stock, accompanied by an agreement between the parties, whether formal or not, that the mortgagor shall continue in possession and sell the goods as before for his own benefit; followed by such sale in fact, is fraudulent and void as to the mortgagor's creditors. Such an arrangement is regarded as inconsistent with the avowed object of the mortgage, which is to secure a debt. A secret purpose to protect the mortgagor in the enjoyment of the property, and enable him to set his other creditors at defiance, is conclusively presumed.³ Although there was no agreement or understanding at the time of the mortgage that the mortgagor might continue the sale of the mortgaged goods, a subsequent agreement to that effect, when carried out, will have that effect; and such agreement is proved by evidence that the mortgagor did continue to sell the mortgaged goods on his own account, with the knowledge of the mortgagee and without objection on his part.⁴ Permitting sales to a substantial amount is wholly inconsistent with the avowed object of the mortgage, and is only a shield to the mortgagor against the claims of his creditors.

But in a later case upon this subject the qualification is made that a mortgagor may, as agent of the mortgagee, sell the property for the purpose of applying the proceeds to the payment of the mortgage debt;⁵ but the proceeds in such case must be applied to the mortgage debt, whether they are actually paid over to the mortgagee or not. Any understanding that the mortgagor may sell the property for his own benefit, without accounting for the proceeds, will invalidate the mortgage. This would be a trust inconsistent with the legitimate purposes of the mortgage, and would establish a legal presumption of a fraudulent intent to pro-

¹ Comp. Stats. 288, § 20; *Turner v. ley v. Hill*, 9 N. H. 31, 33; *Coolidge v. Killian*, 12 Neb. 580. *Melvin*, 42 N. H. 510, 520.

² *Davis v. Scott*, 22 Neb. 154.

⁴ *Putnam v. Osgood*, 52 N. H. 148.

³ *Putnam v. Osgood*, 51 N. H. 192; *Ranlett v. Blodgett*, 17 N. H. 298; *Coburn v. Pickering*, 3 N. H. 415. And see *Wink-*
⁵ Gen. L. 1878, ch. 137, § 13, prohibit sales by the mortgagor without the consent of the mortgagee in writing upon the mortgage and recorded.

fect the mortgagor in the enjoyment of the property. But there is no secret trust when the sale is honestly made for the purpose of extinguishing the mortgage debt. The existence of a secret trust is moreover a question of fact; and only the resulting fraud is an inference of law. Fraud is not to be conclusively inferred from the mortgagee's omission to declare, in a written permission of sale, that the proceeds are to be applied towards the extinguishment of the debt, and not retained for the benefit of the mortgagor. The written consent may be explained. If in fact the mortgagor act as agent of the mortgagee in making sales, this may be shown, and the proceeds will then be regarded as applied upon the mortgage, as soon as they reach the agent's hands. There can be no inference of fraud or secret trust under such circumstances.¹

¹ *Wilson v. Sullivan*, 58 N. H. 260; *S. C.* 9 Rep. 614. In this case the mortgagee indorsed upon the mortgage at the time of its execution the following: "Consent is hereby given to the mortgagors' selling the within mortgaged property, at their store in Suncook, in the regular and usual way of retail trade, subject, however, to the right of the mortgagee to revoke this consent at his pleasure." Mr. Justice Foster, delivering the opinion of the court, said: "In the case of a recorded mortgage the retention of possession is of course objectionable; but the selling of the goods occupies the same position in respect to the mortgage that the mere retention and use of the goods does in respect to an absolute sale. By our statute, a sale by the mortgagor is as permissible as retention of possession. The permission undoubtedly raises a presumption, *prima facie*, of a secret trust, and the secret trust being shown, the fraudulent intent is conclusively presumed; but as the intention may be explained in the case of retention of property by the vendor after sale, so may the sale of the goods by the mortgagor. The explanation need not be expressed in the written consent. The settled rule, that the written consent may be explained, necessarily implies that it may be explained by evidence not contained in the writing

itself. . . . There is no secret trust when it appears from all the evidence that the permitted sale is honestly made for the purpose of extinguishing the mortgage debt, and not (except incidentally) for the advantage of the mortgagor. Such a sale and such an application of the proceeds has no tendency to hinder, delay, or defraud the unpreferred creditors.

"Where the mortgagee, by written and recorded consent, permits the mortgagor, as his agent, to sell the goods as the mortgagee's goods and to receive the money as the mortgagee's money, the proceeds thus received by the agent being the property of the mortgagee in the hands of his agent, the mortgagor, the transaction is lawful and valid, and an agreement that all this may be done (when a written consent to the sale of the goods is recorded) is a lawful agreement. In the case before us, if no actual fraud or secret trust is disclosed; if the mortgagor, in selling the goods and retaining the proceeds, is regarded simply as the agent of the mortgagee; and if those proceeds, as soon as they reach the hands of the agent, be regarded as applied, and the debt *pro tanto* extinguished, whether the money has actually passed from the hands of the agent to those of the principal or not,—it is difficult to see how any legal inference of

If the mortgagee take possession of the mortgaged goods together with others not mortgaged, under an agreement that the mortgagor shall sell the goods and pay over the proceeds to the mortgagee, as this amounts to a pledge of the goods accompanied by a delivery the mortgagee will be protected against a subsequent attachment of the goods by a creditor of the mortgagor.¹ The possession is then by virtue of the pledge, and not by virtue of the fraudulent mortgage. Possession under and by virtue of that would not avail for the mortgagee's protection,² unless it provided for the payment of the proceeds of all sales to the mortgagee.

400. In New Jersey, even prior to the statute requiring either delivery and possession or record, an unrecorded mortgage of personal property, the possession of which remained with the mortgagor, was not conclusively void as against the mortgagor's creditors and purchasers without notice. The mortgagor's possession was regarded as *prima facie* evidence of fraud, but might be explained. It merely affected the rule of evidence, shifting the burden of proof from the party attacking the mortgage to the party setting it up.³ In a mortgage by a merchant or manufacturer of his stock of goods, permission given to the mortgagor to remain in possession, selling and disposing of his stock without restriction, in the ordinary course of trade, is only evidence of fraud to go to the jury that the mortgage was made and kept on foot for fraudulent purposes. The mortgagor in selling the goods is considered to be acting as the agent of the mortgagee, and as receiving the proceeds of the sales for him.⁴

The question whether a mortgage of a stock of merchandise which empowers the mortgagor to sell in the usual course of business, is conclusively fraudulent or not, was first directly decided in a recent case in chancery; and it was held that whether such a mortgage is fraudulent or not is a question of fact, to be determined by proof in the same manner as other questions of fact are determined.⁵

fraud or of a secret trust can be said to result from such circumstances." See, also, *Wilcox v. Jackson*, 7 Colo. 521.

¹ *Pettee v. Dustin*, 58 N. H. 309.

² *Janvrin v. Fogg*, 49 N. H. 340, 351. See § 167.

³ *Runyon v. Groshon*, 12 N. J. Eq. 86. And see *Parr v. Brady*, 37 N. J. L. 201.

⁴ *Miller v. Shreve*, 29 N. J. L. 250. See *In re Bloom* (U. S. Dist. Ct.), 17 N. Bank. R. 425; *Miller v. Jones* (U. S.), 15 N. Bank. R. 150.

⁵ *Lister v. Simpson*, 38 N. J. Eq. 438.

401. In New York the question of fraud in chattel mortgages is materially affected by statute; for although a mortgage be duly filed, it is presumptively fraudulent and void if the mortgagor remain in possession.¹ It is declared that every assignment of goods and chattels by way of mortgage or security, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be presumed to be fraudulent and void as against the creditors of the mortgagor or subsequent purchasers in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the person claiming under such mortgage, that the same was made in good faith and without intent to defraud such creditors or purchasers.²

With some fluctuation of opinion in the courts, the doctrine prevails that an agreement between the mortgagor and mortgagee of personal property that the former may dispose of the mortgaged property for his own use, renders the mortgage fraudulent and void in law.³ But it is regarded as material whether the agreement be contained in the mortgage or not. When such agreement is not contained in the mortgage, the question of its existence, and of the indications of fraud arising from it and the conduct of the parties, is one for the jury.⁴ The mere fact that the mortgagor continues to sell the mortgaged property, consisting of goods in a store, with the knowledge of the mortgagee, does not render the mortgage fraudulent in law as against other creditors, in the absence of proof that this was pursuant to an agreement between the parties.⁵ The court cannot pronounce the mortgage void unless there was an agreement, either in the mort-

¹ *Dutcher v. Swartwood*, 15 Hun, 31; *Smith v. Acker*, 23 Wend. 653; *Groat v. Rees*, 20 Barb. 26; *Otis v. Sill*, 8 Barb. 102.

² 3 Rev. Stats. 143, § 5.

³ *Griswold v. Sheldon*, 4 N. Y. 581; *Edgell v. Hart*, 13 Barb. 380; *S. C.* 9 N. Y. 213; *Wood v. Lowry*, 17 Wend. 492; *Gardner v. McEwen*, 19 N. Y. 123; *Mars-ton v. Vultee*, 12 Abb. Fr. 143; *S. C.* 8 Bosw. 129; *Delaware v. Ensign*, 21 Barb. 85; *Ford v. Williams*, 13 N. Y. 577; *Southard v. Benner*, 72 N. Y. 424; *Dodds v. Johnson*, 3 Thomp. & C. 215; *Divver v. McLoughlin*, 2 Wend. 596; *McLachlan*

v. Wright, 3 Wend. 348; In *Matter of Cantrell*, 6 Ben. 482; *Bainbridge v. Richmond*, 17 Hun, 391; *Ball v. Slafter*, 26 Hun, 353; *Sperry v. Baldwin*, 46 Hun, 120; *Reynolds v. Ellis*, 103 N. Y. 115.

Considering the doubtful origin of this doctrine in *Griswold v. Sheldon*, *supra*, which was decided by a court equally divided in opinion, it has had a remarkable following both in New York and in other states.

⁴ *Gardner v. McEwen*, *supra*; *Southard v. Pinckney*, 5 Abb. N. C. 184.

⁵ *Frost v. Warren*, 42 N. Y. 204.

gage itself or between the parties to it, the necessary construction of which permits the mortgagor to sell the mortgaged property for his own benefit;¹ but if there be such an agreement in the deed, or a separate oral or written agreement undisputed or proved, the court must pronounce the mortgage void, and cannot leave the question to the jury to determine whether it was made in good faith.² And so if the mortgage obviously contemplates, though it does not expressly provide for, the consumption of some of the mortgaged goods in course of manufacture, the use of the proceeds in the business of the mortgagor, the purchase of other chattels to replace those consumed, and the continuance of the mortgagor in possession until a breach of condition, it is void as against a creditor of the mortgagor, or as against any one succeeding to such creditor's rights.³

A clause in a mortgage of a stock of goods, which purports to extend the lien of the mortgage over after-acquired property, does not render it absolutely void where there is no arrangement permitting the mortgagor to deal with the goods mortgaged, and no intent to defraud creditors is affirmatively found.⁴ If a mortgage be void and fraudulent, by reason of such an agreement, as to part of the property covered by it, — as, for instance, a stock of goods, — it is void and fraudulent as to all the property embraced in it, although the agreement does not apply to such other property.⁵

An agreement that the mortgagor shall sell the mortgaged goods for cash only, for the benefit of the mortgagee, does not render the instrument conclusively fraudulent; it only raises a question of good faith, to be determined by the jury, the burden of proof being upon the party who claims under the mortgage.⁶

¹ *Hastings v. Parke* (Superior Ct. Buffalo, 1880), 22 Alb. L. J. 115; *Chatham National Bank v. O'Brien*, 6 Hun, 231; *Potts v. Hart*, 99 N. Y. 168, 173; 1 N. E. Rep. 605; *Manufacturers' & Traders' Bank v. Koch*, 12 N. E. Rep. 9.

² *Marston v. Vultee*, 8 Bosw. 129; *Smith v. Cooper*, 27 Hun, 565.

³ *Wagner v. Jones*, 7 Daly, 375. See, however, *Brackett v. Harvey*, Ct. of Appeals, Jan. 23, 1883, stated *infra*.

⁴ *Yates v. Olmsted*, 56 N. Y. 632 (reversing *S. C.* 65 Barb. 43, 462, and in ef-

fect overruling *Mittnacht v. Kelly*, 3 Abb. App. Dec. 301); *S. C.* 3 Keyes, 407.

⁵ *Russell v. Winne*, 4 Abb. Pr. (N. S.) 384; *S. C.* 37 N. Y. 591; *Mittnacht v. Kelly*, *supra*.

⁶ *Miller v. Lockwood*, 32 N. Y. 293; *Ford v. Williams*, 24 N. Y. 359; *Conkling v. Shelley*, 28 N. Y. 360; *Johnson v. Curtis*, 42 Barb. 588; *Ostrander v. Fay*, 3 Abb. App. Dec. 431; *City Bank v. Westbury*, 16 Hun, 458; *Caring v. Richmond*, 22 Hun, 369.

In such case the mortgagee makes the mortgagor his agent, and the latter's dealing with the property must be considered as the act of an agent, and not the act of the mortgagor.¹ The sales made and the proceeds received by the mortgagor under such an arrangement should be applied in satisfaction of the mortgage, whether the money is ever actually paid over to the mortgagee or not.² As against an adverse lien the proceeds of mortgaged goods received by the mortgagor, under an agreement allowing him to sell for the mortgagee's benefit, are to be deemed to be applied to the payment of the mortgage debt; and then it is impossible that any fraud or injury to another can be imputed to such an agreement.³

The agreement must show that the proceeds are to be applied wholly to the mortgagee's benefit;⁴ and therefore an agreement that the mortgagor may use the proceeds of sales for his support and business, and pay to the mortgagee such sums as he can spare from his general business, will invalidate the mortgage.⁵

Where, also, the agreement was that the mortgagor, who was a manufacturer, should remain in possession, and continue to manufacture and sell, either for cash or on credit, in his discretion, the cash and accounts to be transferred to the mortgagee and applied on the debt when collected, the mortgage was adjudged fraudulent as to creditors and void, because such an arrangement enabled the mortgagor to sell his entire stock on credit, and keep his other creditors at bay.⁶ Treating the question of fraud in such case as one of fact, the acts and declarations of the mort-

¹ *Conkling v. Shelley*, 28 N. Y. 360; *Brackett v. Harvey*, 25 Hun (N. Y.), 502. And see *Overman v. Quick*, 8 Biss. 134.

² *Conkling v. Shelley*, *supra*. See *City Bank v. Westbury*, 16 Hun, 458; *Brackett v. Harvey*, *supra*; *Sperry v. Baldwin*, 46 Hun, 120; *Ellsworth v. Phelps*, 30 Hun, 646.

³ In *Brackett v. Harvey*, *supra*, Finch, J., said: "If the mortgagor sells, and actually pays over the whole proceeds, nobody is harmed, for that only has happened which is the proper and lawful operation of the mortgage. If, on the other hand, such proceeds have not been paid over, the adverse lien is still unharmed,

for as against it such proceeds are deemed paid over and applied in reduction of the mortgage debt, although as between mortgagor and mortgagee the debt remains, and is still unpaid."

⁴ *Dolson v. Saxton*, 11 Hun, 565; *S. C.* 5 N. Y. Week. Dig. 126; *Ball v. Slafter*, 26 Hun, 353; *Brackett v. Harvey*, *supra*.

⁵ *Southard v. Pinckney*, 5 Abb. N. C. 184; *S. C.* 6 N. Y. Week. Dig. 338; *Southard v. Benner*, 72 N. Y. 424. See, also, *In re Burrows*, 7 Biss. 526; *S. C.* 5 N. Y. Week. Dig. 136.

⁶ *City Bank v. Westbury*, *supra*. See, also, to like effect, *Brackett v. Harvey*, *supra*.

gagor while in actual possession were declared competent evidence upon the question of intent, as part of the *res gestæ*.¹

Parol evidence of an agreement made between the parties at the time of the giving of the mortgage, that the proceeds of sales made by the mortgagor should be applied to the payment of the mortgage debt, is inadmissible to control the effect of a mortgage, if it would contradict its terms; as for instance, where the mortgage provides that the mortgagor should have the privilege of selling any of the mortgaged property which he then had on hand and in stock, or which he might thereafter purchase to replenish his stock, provided the stock should not be reduced below a certain value. The mortgage expresses the completed contract, and by that it is clear that the new stock was to be bought with the proceeds of sales made, and that the mortgagee could not require the payment of the entire proceeds to himself.²

A very recent decision by the Court of Appeals indicates a stronger tendency than has ever before been shown to sustain such a mortgage whenever it appears to have been made in good faith, unless it also appears that the mortgagor is authorized to use the proceeds of his sales of the mortgaged property for his own benefit, so that the mortgage may become a shield to protect him against other creditors. In the case before the court the mortgagors were left at liberty to sell and dispose of the mortgaged property, but upon a condition involved in their covenants, that they would apply the proceeds of such sales to the payment of the debt which the mortgage secured. As subsidiary to this general provision two others may be fairly gathered from the agreements taken together: that the mortgagors might sell on credit, taking good business paper having sixty to ninety days' run, and which paper the mortgagee would accept and apply on the debt; and that the mortgagors might use a part of the avails of the sales to replenish and freshen their stock, but if they did, the substituted property was to be placed, by the monthly renewals, in the room and stead of that which was sold to procure it. It was held that the mortgages assailed were not void on their face, and as a legal conclusion from their express terms.³

¹ City Bank v. Westbury, 16 Hun, 458.

² Ball v. Slafter, 26 Hun, 353; and see Kelly v. Roberts, 40 N. Y. 432. But compare Brackett v. Harvey, *infra*.

³ Brackett v. Harvey, 91 N. Y. 214, 222. Mr. Justice Finch, in delivering the judgment of the court, said: "We see no reason to doubt that, on their face, the

In case of an omission to file a mortgage in accordance with the statute, if the mortgagee take possession of the mortgaged

mortgages here assailed were valid unless the two incidental or subsidiary facts operated to modify the result. The first of these was the implied permission to sell for good business paper running sixty or ninety days, which paper the mortgagee was to take and apply on the debt. This stipulation is an inference from the provision of the contract by which the mortgagee agreed to accept such business paper as cash. No express liberty to sell the mortgaged property on credit was given, and the only proper inference of such liberty to be drawn as it respects sales of the mortgaged property is that which we have stated. It was thus a provision in entire harmony with the covenant to apply all sales to the mortgage debt. If the sales were for cash, that was to be paid over; if on a credit of sixty or ninety days secured by good business paper, that was to be at once taken as cash and applied as cash. No permission to sell in any other way was given or can be inferred from the contract, and that actually given made the paper, permitted to be taken, cash as between the parties, to be at once applied upon the debt. We do not see how such a provision can be said to affect injuriously the rights of other creditors. It can only become dangerous by straining it beyond any just inference, and construing it to be a general permission to sell on credit without limitation. The second incidental fact is the implied permission to use proceeds for replenishing the stock; the goods bought to be substituted in the mortgage for those sold. This again is an inference from the stipulation in the original contract for monthly renewals. These could only be necessary to bring in after-acquired property, and permission to acquire it with proceeds of sales is perhaps a just inference, but then only upon condition that the substituted property be brought in and subjected to the mortgage lien. Thus understood, it provides only for a shifting of the lien from one piece of prop-

erty to another taken in exchange. In no respect did it permit anything mortgaged to escape the mortgage. If it did not turn into cash or paper which reduced the mortgage debt, it turned into other property which became itself the subject of the mortgage lien. We think, therefore, that on the face of the papers, giving them a fair and just construction, there was nothing which constrains us to deem them fraudulent in law." See, also, following this case, *Sperry v. Baldwin*, 46 Hun, 120.

It was also contended in this case that there was evidence outside the papers of an agreement between the parties by which the mortgagors were permitted to use the proceeds. The trial court found that there was such an agreement, but exception was taken to this finding, and on appeal it was held that the evidence did not sustain the finding. The principal evidence tending to show such an agreement was the testimony of the mortgagee that he supposed the mortgagor used the proceeds of the business for the support of himself and family. But the court say that this is a statement, not of his supposition when he made the compact, or when the mortgage was given, but merely of his supposition at the moment of his testimony, and in the light of all that had been developed of what the mortgagor in fact had done. "The debt of the mortgagee was an honest debt. Its security by chattel mortgage was just and right. Both parties have sworn that there was no fraudulent intent. The mortgagee was at times lenient, desiring the success of his debtors, but all the time supposed, and had good reason to suppose, that the property mortgaged, or that bought by its proceeds, was steadily appropriated to the payment of the mortgage debt, until just before his seizure of the property remaining, and that seizure was made promptly upon the discovery that the security was lessening. The whole transaction impresses us as honest and just, and we can-

goods before any other lien on them is acquired, and before the filing of a petition in bankruptcy against the mortgagor, the lien is valid against his creditors and his assignee in bankruptcy.¹ But if a mortgage be fraudulent in law, by reason of an agreement that the mortgagor may remain in possession and sell the goods, it is not made valid by the mortgagee's subsequent act in taking possession of the property.²

It is to be observed that the New York decisions are based upon statutory provisions which make retention of possession *prima facie* evidence of fraud. Their general tenor may thus be accounted for, but not their want of harmony. "If we should undertake to follow these decisions, we should have very uncertain guides, and be pursuing a labyrinth without a clew."³ Many of the decisions, while recognizing the authority of the case of *Smith v. Acker*,⁴ seek to evade its force by drawing untenable distinctions. The tendency of the recent cases upon this point is to restrict the old rule of constructive fraud so far as possible, and yet hold to it at all. Thus, the fact of the mortgagor's continuing to sell the goods is not conclusive of fraud, unless it be shown that this was by an agreement of the parties and for the mortgagor's benefit; and the parties may agree that sales may be made for cash or upon credit, for the mortgagee's benefit.

402. In North Carolina a provision in a mortgage of a stock of merchandise, that the mortgagor is to remain in possession and continue to sell the goods, is not fraudulent in law, but raises a strong presumption of fraud, which throws the burden of disproving it upon the party claiming under the mortgage.⁵ In case the mortgagor is not required to account for the proceeds of the sales, such proceeds substantially belong to him, to be expended or applied as he pleases. In the mean time, the entire stock is secure from the reach of his creditors. If there were, moreover, other

not assent to the conclusion that it was fraudulent and void." *Brackett v. Harvey*, 91 N. Y. 214, per Finch, J. It would seem that in the light of this decision some of the earlier decisions in this state were erroneous.

¹ § 178; *Field v. Baker*, 12 Blatchf. 438; *Brown v. Platt*, 8 Bosw. 324; *First Nat. Bank v. Anderson*, 24 Minn. 435.

² *Dutcher v. Swartwood*, 15 Hun, 31;

S. C. 7 N. Y. Week. Dig. 201. See, also, §§ 178, 395, 409.

³ Per Dillon, J., in *Hughes v. Cory*, 20 Iowa, 399.

⁴ 23 Wend. 653. See, also, the discordant case of *Levy v. Welsh*, 2 Edw. Ch. 438.

⁵ *Cheatham v. Hawkins*, 76 N. C. 335; *S. C.* 80 N. C. 161; *Young v. Booe*, 11 Ired. L. 347.

unsecured creditors at the time of the mortgage, and the debtor had no other property out of which such debts could be satisfied, a very strong case of presumptive fraud is presented; and if no proof to rebut such presumption is offered for the jury to pass upon, the presumption raised by the law becomes conclusive.¹ Such presumption of fraud is not rebutted by proof that the debt secured was a *bonâ fide* debt, and that the insolvency of the debtor was unknown to the mortgagee at the time of the execution of the mortgage.² Neither is the testimony of the creditor that an intent to favor the mortgagor, or to delay or defraud his creditors, was not in his mind at the time, sufficient to remove the presumption of fraud arising from the instrument itself, and from evidence *aliunde* that the mortgagor was insolvent at the time, and all his other property under mortgage, and that afterwards he continued in possession, made additions to the stock, and applied the proceeds of his sales to his family and personal expenses and the payment of his other debts. If the law adjudges the effect of a transaction to be to delay, hinder, or defraud creditors, it is to be regarded as fraudulent, although this may not have been the actual intention of the parties.³

¹ Per Bynum, J., in *Cheatham v. Hawkins*, 76 N. C. 335.

² *Holmes v. Marshall*, 78 N. C. 262.

³ *Cheatham v. Hawkins*, 80 N. C. 161. See article, by J. O. Pierce, Esq., 6 South. Law Rev. 96, 112. This case is there strongly claimed as an authority that a power of sale reserved to the mortgagor makes the mortgage constructively fraudulent. This case was twice before the Supreme Court of the state. The mortgage covered the debtor's entire stock of miscellaneous merchandise, and expressly reserved to him the possession. The implication was regarded as irresistible that the mortgagor was to continue selling and trading as before, with liberty to apply the proceeds of sales to his own use as he might see fit. Mr. Justice Bynum, delivering the opinion of the court (76 N. C. 333, 334), said: "This deed approaches the verge of being fraudulent in law, but is not so. To find fraud as a matter of law, it must so expressly and plainly appear in the deed itself as to be incapable

of explanation by evidence *dehors*. If the deed of mortgage had expressed that there were other outstanding debts unsecured by the deed, and that the property therein conveyed was all the bargainor possessed, then, with the reservation of the possession contained in this instrument, the court would hold that such a deed was fraudulent and void on its face. But the court cannot so declare where it is possible to show by extraneous evidence that the mortgage was executed in good faith and for a legal purpose. If, for instance, it could be shown that when this deed was made the mortgagor owed no other debts, or that owing them he had other property outside of the mortgage and liable to execution amply sufficient to pay them, as matter of law the deed must be upheld. Admitting this to be so, it is yet clear that the mortgage affords the strongest possible example of presumptive fraud, and one which can be scarcely rebutted by any existing facts outside of the deed."

After a trial upon the question of fraud,

Where a mortgaged stock of goods is left with the mortgagor for sale, with no agreement that the proceeds of the sales shall be applied to the mortgage debt, testimony of the mortgagor that it was not understood that he was to sell the goods and apply the proceeds to the mortgage debt, as he was expecting other money with which to discharge the debt, is admissible to disclaim the intent to defraud which must coexist with the act of making such mortgage to invalidate it.¹

403. In Ohio, although possession on the part of the mortgagor is only a badge of fraud, which may be removed by showing the transaction was honest, a power of sale reserved to him, either expressly or impliedly, makes the transaction void in law as against subsequent purchasers and execution creditors.² If the power of disposition appear upon the face of the mortgage, or is fairly to be inferred from its provisions, it is the duty of the court so to declare it, without submitting the matter to the jury as a question of fact. If it does not so appear, but is so understood or agreed by the parties at the time the mortgage is executed, it is equally void; and such understanding or agreement may be shown by parol evidence, and may be proved by the conduct of the parties in relation to the subject matter of the mortgage and other circumstances. But in either case, where the fact is made to appear, the mortgage is fraudulent in law, irrespective of the intention of the parties.³ A stipulation in a mortgage which permits the mortgagor to sell at retail only, that the mortgagee shall at all times hold absolute and exclusive possession of the goods as against all persons other than the mortgagor, and shall release all claims to

the case again came before the same court (80 N. C. 161, 163), and Chief Justice Smith said: "The case is now before us with the evidence offered on the one side to rebut, and on the other to strengthen and sustain the presumption. The judge who tried the cause, and by consent of parties passed upon the facts, held that it was not rebutted. We will examine the proof of the 'facts outside of the deed,' and see what is its force and effect." After examining the evidence offered to rebut the presumption of fraud raised by the instrument itself, he said: "The surrounding facts of this case and the uses

made of the goods, the possibility of which brought the mortgage to the very verge of condemnation as fraudulent upon its face, but strengthen instead of impairing the force of the presumption, which is said to be almost impossible successfully to repel."

¹ *Phifer v. Erwin* (N. C.), 6 S. E. Rep. 672.

² *Collins v. Myers*, 16 Ohio, 547; *Good-enough v. Harris*, 1 Disney, 53; *Morris v. Devou*, 2 Disney, 218; *In re Manly*, 2 Bond, 261.

³ *Freeman v. Rawson*, 5 Ohio St. 1, per Ranney, J.

the property as soon as the debt shall be paid, does not take the case out of the rule.¹ But it is held that a mortgage with a power of disposal of the goods reserved to the mortgagor is valid between the parties to it, and when the mortgagee takes possession of the goods before the creditors of the mortgagor have obtained any lien upon them, or purchasers from him have acquired any rights, the mortgage becomes valid so as to protect the property.²

In a recent case, the court limited the generality of the language in the earlier cases to the facts to which such language was applied. It is observed that in each of these cases the terms of the mortgage were such as to reserve to the mortgagor the right to sell the mortgaged property on his own account. Therefore it is only a power of sale in the mortgagor, which leaves in him a dominion over the property inconsistent with the alleged lien of the mortgage, that, according to these earlier cases, is fraudulent *per se*. The court, therefore, limits the doctrine accordingly, and holds that a stipulation in a mortgage of goods that the mortgagor shall retain possession and sell the goods in the usual retail way, paying over the money received therefor to the mortgagee as the goods are sold, does not render the mortgage *per se* fraudulent and void as against creditors of mortgagor.³

404. In Oregon, where it appears either on the face of the mortgage or by parol evidence that the mortgagee of personal property has given to the mortgagor an unlimited power to dispose of the property mortgaged for the use of the mortgagor, the mortgage is pronounced void as to purchasers and attaching creditors of the mortgagor. The statutory provision, that a mortgage

¹ Harman v. Abbey, 7 Ohio St. 218.

² Brown v. Webb, 20 Ohio, 389.

³ Kleine v. Katzenberger, 20 Ohio St. 110. Mr. Justice Scott, delivering the judgment of the court, said: "The fact that the goods may be thus sold for the sole benefit of the mortgagees, and the proceeds applied in discharge of the mortgage debt, is entirely consistent with the idea of a lien upon the goods for the security of the mortgagees. And the fact that the proceeds cannot be applied otherwise, at the pleasure of the mortgagor, is incon-

sistent with the idea of his absolute ownership. That the mortgagor should thus act as the agent of the mortgagees in selling the goods for their benefit is not necessarily in fraud of the rights of other creditors; and if the transaction is *bonâ fide*, it is difficult to see why it should not be upheld. Such an arrangement raises only a question of good faith, to be determined by the jury in the light of all the evidence, and is not *per se* fraudulent." Following Ford v. Williams, 24 N. Y. 359, Miller v. Lockwood, 32 N. Y. 293.

not followed by a continued change of possession in case the instrument be not duly filed creates a presumption of fraud, disputable by showing that it was in fact made in good faith for a sufficient consideration and without intent to defraud creditors, does not reach or affect a mortgage duly filed, and objectionable only by reason of an agreement between the parties that the mortgagor may sell the mortgaged goods. The statute is silent as to the effect of such an agreement; and when this fact is made to appear, it becomes a question of law for the court to determine what shall be its legal effect.¹

405. In Rhode Island, although a mortgage of a manufacturer's or trader's stock of goods, together with all additions to the same or renewals of it that might afterwards be made, is in itself ineffectual to vest in the mortgagee a legal title to the property afterwards acquired,² yet if the mortgagee take possession under the mortgage after the property has been acquired by the mortgagor, the title vests in the mortgagee, both at law and in equity. Regarding such a stipulation as an equitable contract for a mortgage of such property, it is executed by the mortgagee's possession, and there is no need of the intervention of a court of equity to decree specific performance.³ Without such possession, a court of equity would establish the mortgage lien upon the property subsequently acquired.⁴

It appeared, in these cases, that the mortgagor remained in possession, and sold the stock in the usual course of business; and a power in the mortgagor to sell and exchange, if not given in the instruments themselves, was implied in them. Upon the question of fraud the court say: "While in some states a mortgage containing a power to sell and replace, or, where the mortgagor retains possession, has been held to be therefore void, such has not been the doctrine of the courts in this state. Here, the question whether such a mortgage is fraudulent or not is a fact for the decision of the jury upon the circumstances and evidence in the particular case."⁵

¹ *Orton v. Orton*, 7 Oregon, 478.

² *Williams v. Briggs*, 11 R. I. 476.

³ *Cook v. Corthell*, 11 R. I. 482.

⁴ *Williams v. Winsor*, 12 R. I. 9. See, also, *Jenckes v. Goffe*, 1 R. I. 511.

⁵ *Williams v. Winsor*, *supra*, per Potter, J.

405 a. South Carolina. — The question under consideration arose in a recent case where a trader mortgaged his stock of merchandise then in his store, and also such goods as he might thereafter acquire in course of his business, in lieu and place of the stock then on hand. The mortgage was recorded, and the mortgagor remained in possession for some two months, at the end of which time the mortgagee took possession under his mortgage of the entire stock of goods. In the mean time the trader had made a second mortgage of his stock of merchandise then in store, but not including after-acquired goods. The mortgagee in the latter mortgage claimed that the first mortgage was fraudulent in fact, and also that it was fraudulent upon its face. The master found that the mortgage was made in good faith without any fraudulent intent. This finding was affirmed by the Court of Common Pleas, which also in an elaborate opinion examined and rejected the doctrine of presumptive fraud as applicable to such a case, and the judgment was affirmed by the Supreme Court of the state.¹

406. In Tennessee a mortgage conveying a merchant's stock of goods, with a stipulation that the mortgagor may continue the business and dispose of goods, and replenish the stock from time to time, is regarded as void *per se*. The Supreme Court of the state placed their decision to this effect upon the principle that such a mortgage hinders and delays creditors in the enforcement of their claims, by placing the property in the possession and control of the debtor, with the right to use the proceeds of it for his own benefit as if no conveyance had been made, thus giving the debtor a fraudulent advantage over his other creditors, who cannot in the mean time reach the property thus protected.² In a

¹ *Hirshkind v. Israel*, 18 S. C. 157. Judge Cothran, rendering the decree of the Court of Common Pleas, said: "To this doctrine I cannot yield assent. It is not in harmony with the principles of justice; it is not consistent with truth, which for a time, at least, it may crush; and it may be well to consider lest, in intemperate zeal to prevent fraud, we do err in that more reprehensible extreme of perpetrating a judicial wrong."

² *McCrasly v. Hasslock*, 4 Bax. 1; *Bank*

of *Rome v. Haselton*, 15 Lea, 216; *Tennessee National Bank v. Ebbert*, 9 Heisk. 153; overruling the case of *Hickman v. Perrin*, 6 Coldw. 135, where it was held that a stipulation in a mortgage that the mortgage debt should be paid out of the proceeds of the sales of the mortgaged goods, the mortgagor retaining only a sufficient amount of them to keep up the stock, did not invalidate the mortgage. Judge Shackelford said: "To hold that a merchant cannot mortgage his goods with-

later case, before Chancellor Cooper, that eminent judge, though arriving at the same conclusion, that such a mortgage is void *per se*, declared, that "the reason of the decisions against the validity of such deeds does not rest, as has been thought, on a presumption of fraud, in conflict with the general rule that the question of fraud, arising out of the retention of possession by the grantor with power of disposition, is one of fact, to be determined by the circumstances of the particular case. It rests, principally, upon the ground that such a transaction, irrespective of fraud, is against public policy, throwing open too wide a door for possible fraud, and the contract" (so far as relates to future acquisitions) "does not fall within that class of which a court of equity will decree the specific performance."¹

407. Texas. — In a recent case there were strong expressions in the opinion of the justice who pronounced the judgment, which seemed to give countenance to the conclusion that a mortgage upon a stock of goods, where the mortgagor retains possession, and, with the knowledge and consent of the mortgagee, sells them in the usual course of trade, and applies the proceeds to replenish the stock, is fraudulent in law as to third persons, although it be recorded.² It was declared that there should be a marked and well-defined distinction, upon reason and public policy, drawn between a mortgage with power simply to retain possession, and one with power to retain possession and dispose of the property, as though the absolute title and right of disposition still belonged to the mortgagor.

But in a later case the Supreme Court of the state qualify and restrict the decision in that case, saying that the court in that case was exercising the blended functions of court and jury; and moreover that the facts of the case were peculiar, in that possession and right to sell were conferred upon the mortgagor for an indefinite duration. Upon the main question the court squarely hold that a mortgage which authorizes the mortgagor to retain

out closing his doors would be to hold that no merchant could mortgage his stock."

¹ Phelps v. Murray, 2 Tenn. Ch. 746, 754.

² Peiser v. Peticolas, 50 Tex. 638; S. C.

32 Am. R. 621; 8 Rep. 408, following Robinson v. Elliott, 22 Wall. 513. And see Crow v. Red River Co. Bank, 52 Tex. 362; Cook v. Halsell, 65 Tex. 1.

possession, and to continue selling in the usual course of trade until default, is not, *per se*, fraudulent and void.¹

But it is now provided by statute that every mortgage, deed of trust, or other form of lien attempted to be given by the owner of any stock of goods, wares, or merchandise, daily exposed to sale, in parcels, in the regular course of the business of such merchandise, and contemplating a continuance of possession of said goods, and control of said business, by sale of said goods by said owner, shall be deemed fraudulent and void.²

408. In Virginia a stipulation in a deed of trust conveying a stock of goods, that the grantor may remain in possession and make sales, accounting to the trustee if required to do so, is regarded as fraudulent *per se*, and void.³

The rule is the same where there is no express provision that the grantor shall retain possession and carry on the business, but the power to do so arises by clear and irresistible implication.⁴ But the presumption of law is in favor of honesty, and the court

¹ Scott v. Alford, 53 Tex. 82; S. C. 3 Tex. L. J. 593. Chief Justice Moore, speaking for the court, said: "While there is no doubt great conflict in the decisions upon the point, we are not prepared to say that such a stipulation in a deed of trust without reference to the facts is legal fraud. In our opinion the weight of authority is against it. To hold that authority to sell in his usual course of business invalidates the deed would virtually deny to a trader the right to give a mortgage upon his stock for ever so short a time, and however inconsiderable the debt might be in comparison with the mortgaged property, or however clearly the facts might demonstrate that there was no intent or purpose to defraud." Citing Fletcher v. Morey, 2 Story, 555.

² G. L. 1879, ch. 53, § 17.

³ Lang v. Lee, 3 Rand. 410; Addington v. Etheridge, 12 Gratt. 436; Perry v. Shenandoah Nat. Bank, 27 Gratt. 755; Sheppards v. Turpin, 3 Gratt. 373; Spence v. Bagwell, 6 Gratt. 444; Quarles v. Kerr, 14 Gratt. 48; Marks v. Hill, 15 Gratt. 400; Brockenbrough v. Brockenbrough,

31 Gratt. 580, 590. In the first named case Mr. Justice Carr, stating the grounds of the decision, said: "Now, can we imagine a power more completely adequate to the destruction of the avowed purpose of the deed than that retained by the grantor in this case? The goods, the identical articles of merchandise, constituted the sole security provided by the deed for the payment of the debts; and yet the debtor, while affecting to devote the goods to that purpose, retains the possession, the use, the power of selling every article, to whom, in what manner, and on what terms, he pleases. He is to account, though, if called on. But is this more than a personal accountability? The goods are gone; you cannot follow them. The money received from them has no ear-mark. You cannot follow it, though the grantor pay it away the moment after he receives it, in satisfaction of his own debt. What are you, then, after all, but a general creditor?"

⁴ Perry v. Shenandoah Nat. Bank, 27 Gratt. 755.

cannot presume fraud unless the terms of the instrument preclude any other inference.¹

408 a. Washington Territory. — A mortgage of a stock of goods, which allows the mortgaged property to be retained by the mortgagor, and sold by him at retail, for the sole purpose of applying the proceeds to the payment of the mortgage debt, is valid as against the mortgagor's creditors.²

But a provision in a chattel mortgage that the goods may be sold and disposed of "for the sole use and benefit of the mortgagee" is not regarded as a sufficient restriction upon the use of the proceeds, for it does not make it certain that the proceeds shall be applied upon the mortgage debt.³

409. In Wisconsin a mortgage of a stock of goods which permits the mortgagor to remain in possession and to sell and apply the proceeds, or any part of them, to his own use, is fraudulent and void in law as against the mortgagor's creditors.⁴ An agreement allowing the mortgagor to dispose of the goods in the course of his trade, and apply one half of the proceeds of the sales upon the mortgage debt, without making any provision for the disposition of the other half, in effect leaves the other half at the absolute disposal of the mortgagor, for his own use, and renders the mortgage void in law.⁵ In a controversy respecting such a mortgage, between the mortgagee and a creditor of the mortgagor, there can be no question for the jury whether the mortgage was in fact made in good faith. The taking of possession of the goods by the mortgagee, upon default, does not give him a valid title against the mortgagor's creditors. His possession under the mortgage is just as good, or just as bad, as the mortgage itself.

¹ Williams v. Lord, 75 Va. 390.

² Langert v. Brown, 13 Pac. Rep. 704.

³ Byrd v. Forbes, 13 Pac. Rep. 715.
 "This peculiar restriction, taken in connection with the other provisions surrounding it, is consistent with and rather suggests the idea that the parties intended the mortgagor to have his option either to apply the proceeds to the satisfaction of the mortgage debt, or to use them in paying for new bills of goods from the mortgagee, so long as the latter did not insist

on cancelling the older debt. An arrangement like that might be prolonged indefinitely, and would be from the first and all the time palpably unjust to the other creditors."

⁴ Cotton v. Marsh, 3 Wis. 221; Place v. Langworthy, 13 Wis. 629; Steinart v. Deuster, 23 Wis. 136; Bowen v. Clark (Dist. Ct. for Wis.), 5 Am. L. Reg. 203; In re Kahley, 2 Biss. 383.

⁵ Blakeslee v. Rossman, 43 Wis. 116.

A void mortgage cannot be transmuted into a valid pledge. No change of possession can purge the mortgage of the fraudulent provision for the disposal of the goods, or operate to make that valid which was void before.¹ Yet the mere fact of leaving a stock of goods in the mortgagor's possession, with instructions to go on and sell as usual, and make remittances to the mortgagee, though proper evidence to go to the jury, in connection with other facts, upon the question of fraudulent intent, does not of itself amount to fraud.²

But when an agreement was made between the parties to a mortgage, before its delivery, that a certain item of property included in it should be stricken out because the mortgagor was under a contract obligation to deliver it to another person, and by mistake the instrument was delivered without making the agreed change, and the mortgagor afterwards delivered the property intended to be omitted to such other person, it was held that there was no fraud against other creditors. The effect of the agreement was not to give the mortgagor permission to sell mortgaged property and to use the proceeds, but to take such property out of the mortgage from the beginning.³

Where supplies were furnished by a mortgagee to a mortgagor to enable the latter to get out a quantity of logs for the mortgagee under a contract, the mortgage was not invalid because the mortgagee had a direct interest in having the supplies used, and their use was for the benefit of the mortgagee rather than for the benefit of the mortgagor.⁴

409 a. Wyoming Territory.⁵ — It is lawful for the parties to

¹ *Blakeslee v. Rossman*, 43 Wis. 116, criticising Illinois cases to the effect that taking possession purges the mortgage of fraud, as resting upon the theory that the provision for disposal of the goods does not taint the entire mortgage. Compare earlier case, *Oliver v. Town*, 28 Wis. 328. But see § 178.

² *Fiske v. Harshaw*, 45 Wis. 665; *S. C.* 7 Rep. 606; 8 Cent. L. J. 159; *Cotton v. Marsh*, 3 Wis. 221. In a case before the U. S. District Court for Wisconsin, *Hopkins, J.*, held that if such power of sale be not in the mortgage itself, but the existence of it be found by the jury, it then

becomes the duty of the court to instruct the jury that such power of sale, by consent or understanding of the parties, avoids the mortgage. *In re Kahley*, 2 Biss. 383.

³ *Allen v. Kennedy*, 49 Wis. 579; *S. C.* 5 N. W. Rep. 624.

⁴ *Knapp, & Co. v. Deitz*, 64 Wis. 31.

⁵ Laws 1882, ch. 11, § 9; R. S. 1887, § 78. This statute shall not be held and taken to affect, in any way, any rights or liabilities existing under any mortgage executed and recorded prior to the passage hereof.

any mortgage, or instrument intended to operate as a mortgage, of personal property, to insert therein permission to the mortgagor to use, handle, operate, herd, manage, and control the property mortgaged, and to market, sell, and dispose of portions thereof as may be necessary in the course of business, or to preserve and care for the same, and replace such property or parts sold with other property of like kind and character, which shall be subject to the operation and effect of such mortgage. But such permission shall not allow the mortgagor to retain and use the proceeds of any such sale or sales to his own use, but the same shall be applied as and towards the payment of the debt or obligation secured by such mortgage.

III. *The Doctrines of the Federal and English Courts.*

410. The Supreme Court of the United States, in a case coming to it from the State of Indiana, has held that a mortgage of a stock of goods which permitted the mortgagor to remain in possession, and dispose of the goods in the usual course of trade, is fraudulent at law and void.¹ The decision had reference to the supposed rule of the courts of the State of Indiana upon the subject; yet Mr. Justice Davis, delivering the opinion of the court, declared this doctrine to be so general and just, that it may be presumed to be the law of the state, in the absence of express and unambiguous decisions of the courts of the state to the contrary.

In a later case going to this court from the State of Michigan, the court followed the doctrine established in that state that a power of disposal in the mortgagor of a stock of goods does not invalidate the mortgage as a matter of law.² In this case a mortgage was made of a stock of merchandise, and all future additions to or substitutions for such merchandise. Subsequently another mortgage was executed to a savings bank, which took immediate possession. In a contest between the mortgagees the bank contended that the prior mortgage was fraudulent as against subsequent creditors and mortgagees in good faith, in that it was contemplated that the mortgagors should remain in possession, and

¹ Robinson v. Elliott, 22 Wall. 513. See, United States courts, in Crooks v. Stuart, also, Bank of Leavenworth v. Hunt, 11 2 McCrary, 13.
Wall. 391. But see § 387.

² People's Sav. Bank v. Bates, 7 Sup. Ct. Rep. 679.

Robinson v. Elliot, *supra*, followed as settling the general rule of law for the

prosecute the business in the ordinary mode. Upon this point Mr. Justice Harlan said: "The mortgage certainly contains no provision of that kind. But if the extrinsic evidence establishes that such a course upon the part of the mortgagors was in fact contemplated by the mortgagees, it would only show that the mortgagees were willing to give the mortgagors an opportunity to avoid a suspension of their business and bankruptcy; the additions to the stock in trade being brought under the mortgage, so as to compensate the mortgagees for any diminution in value by reason of goods disposed of in the usual course of business. If the mortgage had, in terms, made provision for such a course upon the part of the mortgagors, as the bank contends was in the contemplation of the mortgagees, it would not be held, as matter of law, to be absolutely void or fraudulent as to other creditors. The good faith of such transactions, where they are not void upon their face, is, under the statutes of Michigan, a question of fact for the determination of the jury. That rule does not, however, restrict the power of the court to give to the jury a peremptory instruction covering such an issue, when the evidence is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is." But it is to be observed, as regards the general authority of the decisions of the United States courts upon this subject, that the decisions of the supreme court of a state establish a rule of property which is as binding upon a court of the United States, in a case coming to the court from such state, as it is upon the courts of the state.¹

411. In the Circuit and District Courts of the United States the question has arisen several times, and been passed upon. Generally, the decisions have followed the doctrine established in the state in which the case arose, as an established rule of property; and several of these decisions have been noted under the head of the several state decisions.

The Circuit Court of the United States for the District of Oregon, applying a statute of the state making all conveyances of goods and chattels, in trust for the person making the same, void as against his existing or subsequent creditors, and applying as well general principles of law, held that a mortgage of a stock of goods, accompanied by an oral agreement or understanding be-

¹ *Morse v. Riblet*, 22 Fed. Rep. 501.

tween the parties that the property should remain in the possession of the mortgagor, and be disposed of by him in the course of his business, and the proceeds applied to his own use, is, in effect, an assignment of such property in trust for the person making it, and is void as against both existing and subsequent creditors of the mortgagor.¹

The District Court of the United States held, in a case arising in the District of Nevada, that, independently of the statute, a mortgage of a stock of goods, accompanied with a verbal understanding that the mortgagor should remain in possession and continue to sell and traffic with them as his own, so long as the mortgagee pleased, is fraudulent and void as to creditors.²

In the Circuit Court for the District of Texas, Judge Bradley, of the Supreme Court, held that a chattel mortgage is not invalidated by the mere fact that the mortgagee permits the mortgagor to sell and dispose of the mortgaged chattels as his own, this being a matter affecting the mortgagee only, who is not bound to apply the proceeds of the incumbered property to the secured debt.³

In the Circuit Court for the District of New Jersey,⁴ a case arose upon a mortgage of the ordinary goods and chattels connected with a brewery, including lager beer there manufactured, and such property as the mortgagor might afterwards acquire and place in the brewery. The mortgagor continued in possession.

¹ Catlin v. Carrier, 1 Sawyer, 7; Code of Oregon, § 655.

² *In re Morrill*, 2 Sawyer, 356; S. C. 8 N. Bank. R. 117.

³ Barron v. Morris, 14 N. Bank. R. 371.

⁴ Miller v. Jones, 15 N. Bank. R. 150. The district judge had noticed this difference between the present case and that in Robinson v. Elliott, but thought it of no importance, because, as he said, through all the years of the existence of the mortgage, the mortgaged goods were continually changing with the knowledge and assent of the mortgagee, and he could not help knowing that such must necessarily follow the mortgagor's method of carrying on the business. Upon this point Mr. Justice Strong said: "When the question is whether an instrument in writing is of itself a fraud in law, the answer must be made in view of the instrument alone. A

court cannot call to its aid a presumed or assumed collateral understanding adverse to or differing from the written contract of the parties. - The existence or non-existence of such an understanding or agreement is a fact, which, like other facts, must be found by the jury. Certainly must this be so when the conduct of the parties after the mortgage was made is relied upon as proof of the collateral parol understanding. In such case the fraud or honesty of the attempted transfer of the property is dependent for its proof upon a mingled body of evidence, partly parol and partly written, which, of course, must go to the jury. I think, therefore, the District Court erred in concluding, upon the supposed authority of Robinson v. Elliott, that the mortgage under consideration in this case was fraudulent in law."

The judge of the District Court had held the mortgage fraudulent in law, relying upon the authority of *Robinson v. Elliott*; but the Circuit Court, Mr. Justice Strong delivering the opinion, distinguished the case before it from *Robinson v. Elliott*, in that it contained no express agreement that the mortgagor might remain in possession, though such an agreement might perhaps be fairly inferred; and also that it contained no stipulation that the mortgagor might sell or dispose of the chattels mortgaged for his own use, or for any purpose at all.

Upon the general question involved in *Robinson v. Elliott*, the learned judge, after remarking that it had in many cases been decided that a mortgage of chattels which permits the mortgagor to remain in possession, and to dispose of the goods in the ordinary course of his business, is not of course fraudulent as a matter of law, further said: "The English registration acts, and those of many of our states, have, at least, for their object, protection of both the mortgagor and mortgagee, in the retention of possession and use by the former, and this without any wrong to other creditors, for provision is made for notice to them. But the retention of possession by the mortgagor involves necessarily the consumption in a greater or less degree of the thing mortgaged. All personal property is consumed more or less by its use; certainly the use involves a constant depreciation in value. If, therefore, authorized consumption of the chattels mortgaged renders the mortgage in all cases fraudulent in law, it follows that no valid mortgage of chattels can be made which stipulates for continued possession by the mortgagor. Then the registration acts are totally inoperative. But this is nowhere claimed. It was not in *Robinson v. Elliott*. It has been held, indeed, in a few states that a chattel mortgage which stipulates that the mortgagor may continue in possession *and sell* the goods in the ordinary course of business is constructively fraudulent, but the doctrine is denied in England, in Maine, Massachusetts, Iowa, and Michigan."

412. *Brett v. Carter*. — The case, however, which, more than any other, has brought about the discussion and examination of the subject within the last few years, is that of *Brett v. Carter*,¹ in the United States District Court for Massachusetts. Judge Lowell, in an opinion of marked ability and force, criticises the

¹ 2 Low. 458; S. C. 3 Cent. L. J. 286.

doctrine of fraud in law as applied to such cases, and clearly sets forth the grounds of his own decision against this new doctrine. He said: "I had supposed it to be well settled, — after much debate and conflict of opinion, certainly, but substantially settled, — that when a vendor or mortgagor was permitted to retain the possession and control of his goods and act as apparent owner, the question whether this was a fraud or not was one of fact for the jury, excepting under a peculiar clause of the bankrupt law of England. It is so pronounced by Mr. May, in his valuable treatise on Voluntary and Fraudulent Conveyances,¹ and by the cases he cites; and by the learned editors, both English and American, of Smith's Leading Cases.² By the law of England, as I understand it, there are no constructive or artificial frauds, or, if the term is preferred, frauds in law, remaining, excepting, 1st, such as are expressly made so by statute; as for instance, when a bankrupt retains the order and disposition of goods as apparent owner with the consent of the true owner. We have not adopted this part of the bankrupt law, as was somewhat emphatically said in a late case in the Supreme Court;³ or, 2d, where the act is necessarily a fraud on creditors; as where an insolvent person gives away a part of his estate for no valuable consideration, or the whole of it to one antecedent creditor. These, to be sure, are examples; but very few others could be adduced; and I understand the true law both here and in England to have been, until lately, that a conveyance for a valuable present consideration is never a fraud in law on the face of the deed, and if fraud is alleged to exist, it must be proved as a fact; and that was the law even before registration was required for the benefit of persons dealing with the mortgagor. It is very strange that after our legislatures have met the difficulties of Twyne's case, by requiring registration, which gives not only constructive, but in most cases actual, notice of mortgages, and when many of them have provided that fraud shall be a question of fact for the jury, the decisions which I have cited and others following them should have reverted to the harsher doctrine, which had already grown obsolete before the laws provided any notice at all, or any rule of evidence about fraud."⁴

¹ P. 126.

² Notes to Twyne's case, vol. i. p. 1, &c.

³ Sawyer v. Turpin, 91 U. S. 114, 121.

⁴ The learned judge further said: "If

it be said that this is one of those cases

in which fraud is a necessary result of

413. In England the doctrine of constructive or artificial fraud has no application whatever to conveyances, whether absolute or conditional, made for a valuable consideration. If fraud is alleged to exist in a sale or mortgage, it must be proved as a fact, and is never adjudged to exist, in law, on the face of the deed. Though the vendor or mortgagor remain in possession, and act as apparent owner of the mortgaged property, either with or without a power of disposal, the question of fraud is, in every case, to be determined as one of fact.¹ Such, also, is understood to be the law of Canada.² Even a mortgage of the whole of a debtor's property, including household furniture, implements of husbandry, farm stock, and all personal property which the debtor may from time to time, and at all times thereafter, be possessed of or entitled to, made to secure a present debt and future advances, is not void under the statute 13 Elizabeth,³ although it was intended that the mortgagor should remain in possession of the property comprised in the deed, and should carry on his business, substituting new chattels for those which he sold in the ordinary course of business, and that the mortgagee's security should continue on the substituted chattels. A mortgage of such future property, since the case of *Holroyd v. Marshall*,⁴ has invariably been held to be valid; and it makes no difference, in regard to the statute of Elizabeth, whether the mortgage deals with the whole, or only a part, of the grantor's property.

the deed, all I can say is that this brings us to an ultimate fact of observation and experience; and I am unable to see the necessity. Indeed, it is much more difficult for me to see how creditors can be defrauded in such case, when they are told in the deed itself that the debtor has no credit and no property that he can call his own, than that the mortgagee is most outrageously defrauded by such a rule, which devotes his property to the payment of another person's old debts the very instant that he has parted with the possession, taking back a security which is admitted to be honestly given. Take this very case as an illustration. It is admitted there was no fraud in fact; that the trader's whole stock was supplied by the defend-

ant; that the mortgage shows that all the stock present and future is hypothecated, not as a cover or blind, for there was none, but to the payment of a certain debt by certain instalments. No offer is made to prove that any one was deceived or even was ignorant of the mortgage; but I am asked to find fraud in law when I know, and it is admitted, there was none in fact."

¹ *May on Voluntary and Fraudulent Conveyances*, 106; *Twyne's case*, 1 *Smith's Lead. Cas.* 1 *et seq.*; per *Lowell, J.*, in *Brett v. Carter*, 2 *Low.* 458.

² *Hunter v. Corbett*, 7 *Upper Canada Q. B.* 75.

³ *Ex parte Games*, Ct. App. in Bank. 40 *L. T.* 789.

⁴ 10 *H. L. Cas.* 191.

IV. *Summary of Authorities.*

414. It will be observed that the question under consideration has been passed upon in only about two thirds of the whole number of states and territories of the United States. In some of the older states the question has not arisen, because they have had no recording acts applicable to chattel mortgages, and thus these instruments have not been in use, or, if used, have been subject to the common law rule requiring delivery of possession. Thus, in Pennsylvania, "chattel mortgages are not sanctioned. The common law rule prevails, that one man shall not have a lien on personal property owned by and in possession of another, as against creditors and innocent purchasers."¹ Very much the same may be said in regard to Vermont, where there was no chattel mortgage act until one was passed at the session

¹ *Euwer v. Van Giesen*, 6 Weekly Notes of Cases, 363. An act authorizing chattel mortgages of a few specified articles was passed in 1876, but its operation was limited to five years. *Purdon's Ann. Dig.* 2004.

This state has been claimed as an authority for the doctrine of constructive fraud; 6 South. Law Rev. 112; and the following cases have been adduced in support of that claim, but they do not support the claim in the least.

The case of *Welsh v. Bekey*, 1 Penn. 57, arose upon a mortgage of growing crops which was not accompanied by any delivery of possession or other *indicia* of ownership; and it was in consequence declared fraudulent. *Clow v. Woods*, 5 S. & R. 275, was a similar case. The question was one of delivery and possession.

The case of *Hower v. Geesaman*, 17 S. & R. 251, has no bearing whatever upon the question under consideration. There a debtor reciting his insolvency made a general assignment of "all his estate, real, personal, and mixed," to trustees to sell the same with all convenient speed and pay all his debts, with preferences to certain creditors, and return the surplus to the assignor. The assignees did not take possession, but, on the contrary, the assignor continued his business, which was

that of a tavern-keeper and hat-maker, as before. The transaction was not a mortgage, or anything in the nature of a mortgage. It was a voluntary assignment for the benefit of creditors, and as such was clearly void.

But it is said that "the later case of *McKibbin v. Martin*, 64 Pa. St. 352, exhibits the very pronounced views of the Supreme Court of this state upon the question." The question in this case was whether, upon the sale of the furniture of a hotel, the purchaser had taken such actual possession or control of the property as to make the sale valid against the creditors of the vendors, or whether the possession was merely colorable and the sale fraudulent. The vendee was the father of the vendors, and all the parties had lived together at the hotel, and had assisted in conducting it before the sale, and continued to do so afterwards in very much the same manner. The transaction was not a mortgage, but a sale. No one ever called it a mortgage. Distinctions between fraud in fact and fraud in law were noticed by the court; and it was declared that the retention of possession by the vendor is a fraud in law whenever the thing sold is capable of delivery, and no honest and fair reason can be given for his not giving up possession to the vendee.

of the legislature in 1879. In California and Connecticut, only a few enumerated articles can be mortgaged, if possession is retained by the mortgagor. What the doctrine in these states is, upon the question in hand, has not been determined. Obviously, decisions upon mortgages subject to the common law rule requiring delivery of possession are not of much account.¹ In Louisiana chattel mortgages are unknown.² The statutes of several of the states do not make the filing or recording of a chattel mortgage equivalent to actual delivery and continued change of possession, but only add another to the grounds on which such a mortgage shall be void. If, for any other reason, it was void by the statute concerning fraudulent conveyances, the filing or recording of the mortgage, under the statutes of these states, does not make it valid.³ It is to be noticed that in New York and Nebraska the notice is *primâ facie* fraudulent unless possession be delivered. The fact that in some states no provision is made whereby a cred-

¹ There is reason to suppose that the doctrine of fraud in fact will be applied in Connecticut when the question is raised. *Walker v. Vaughn*, 33 Conn. 577; *Rowan v. Sharps' Rifle Manuf. Co.* 29 Conn. 282; *Calkins v. Lockwood*, 16 Conn. 276. Yet this state has been claimed (6 South. Law Rev. 112) as an authority in favor of the doctrine of constructive fraud, upon the strength of the following cases.

In *Beers v. Botsford*, 13 Conn. 146, 154, Williams, C. J., said: "The court have decided that when the question is, whether a conveyance is *in fact* fraudulent, it is a matter which we cannot in this court decide. But where the question arises upon certain facts found, whether these facts constitute a deed fraudulent in law, the fraud is the judgment of law upon the facts and intents."

To same effect, *Pettibone v. Stevens*, 15 Conn. 19, 26.

In *Bishop v. Warner*, 19 Conn. 460, the question before the court was the effect of a colorable change of possession of personal property under a mortgage not recorded. "For about a year after the possession was first formally delivered, up to the time of the attachment, the mortgagors were carrying on an extensive man-

ufacturing business with the mortgaged property; supplying their customers from day to day; selling the carriages, as they were finished, and they were able to find purchasers; and yet no account of the avails was at any time taken. Can anything short of direct and positive evidence of the fact more clearly or satisfactorily show that the possession, from time to time, delivered to the different assignees of the mortgages, was merely formal and pretended; that it was done only because its tendency was to keep creditors off? Such a possession surely is no better than none; if anything, it is rather worse than none. An entire neglect to take possession renders a sale or mortgage constructively fraudulent; and in some cases, undoubtedly, is conclusive evidence of a fraudulent trust, when there is none such in fact."

But these cases do not touch the question of the effect of a power of sale reserved to the mortgagor.

² *Delop v. Windsor*, 26 La. Ann. 185; R. Code, 3289.

³ *Wood v. Lowry*, 17 Wend. (N. Y.) 492; *Horton v. Williams*, 21 Minn. 187, per Young, J.

itor of the mortgagor can attach his interest in mortgaged personal property has doubtless helped, in such states, to establish the doctrine that mortgages with possession and a power of disposal in the mortgagor are conclusively fraudulent.

415. The states are about equally divided upon this question. The courts and legislatures of seventeen states and territories hold to the doctrine that a mortgagor's possession of mortgaged goods, with power of disposal, does not make the transaction fraudulent *per se*, but at most only *prima facie* evidence of fraud, which is a question of fact for the jury, upon all the evidence and the surrounding circumstances of the case. These states are: Arkansas, Dakota Territory, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, North Carolina, Rhode Island, South Carolina, and Wyoming Territory. On the other hand, the courts and legislatures of sixteen other states and territories, namely, those of Alabama, Colorado, Illinois, Minnesota, Mississippi, Missouri, Montana Territory, New Hampshire, New York, Ohio, Oregon, Tennessee, Texas, Washington Territory, Virginia, and Wisconsin, have, in some form, declared the doctrine that a mortgagor's possession of the mortgaged goods, with power to sell them, is conclusively fraudulent, and must be so pronounced by the court as a matter of law. In Texas the rule was at first established otherwise by the courts, but this was abrogated by a statute, which makes a mortgage under which the owner continues in possession of a stock of goods, and makes sales in the regular course of business, fraudulent and void. In Wyoming Territory, on the other hand, sales by a mortgagor, in the course of business, are expressly sanctioned, and the mortgage is made a lien upon additions to the stock. But the mortgagor is not allowed to retain the proceeds of sales.¹

¹ In a summary made in this section of the first edition of this treatise, thirteen states were named in the first mentioned class, and fourteen states in the second. In the second edition Dakota Territory and South Carolina were added to the first mentioned class, and Indiana and Nebraska were transferred to this class from the second class, in consequence of

decisions made since the publication of the first edition of this work.

In the second edition of this work the states and territories named in the first list numbered seventeen; but in the present edition Alabama and Texas have been transferred to the second list; the former on account of a decision of court, and the latter on account of a statute changing

The Supreme Court of the United States, in a case arising in Indiana, followed the early decisions in that state, which tended to sustain the doctrine of constructive fraud in the cases now under consideration. But not only have the courts of Indiana repudiated this doctrine, but the Supreme Court of the United States has, in a case arising in Michigan, followed the doctrine of the courts of that state that a mortgage of a stock of goods is not, as a matter of law, fraudulent as to creditors or void because the mortgagor is to remain in possession, and prosecute his business in the ordinary way.¹

The Circuit Courts of the United States follow the law of the states in which the questions arise, and are of divided opinion. The English courts are against the doctrine of constructive fraud, and the doctrine in question is rightly considered an American doctrine.

V. The Subject considered upon Principle and Policy.

416. Turning now from the consideration of the authorities upon this question of fraud in mortgages of stocks of merchandise, how does the subject look in the light of legal principles and of reason? And, first, What is fraud in law as distinguished

the rule established by the courts. Arkansas and Wyoming Territory have been added to the first list, the latter on account of the statutory rule. To the second list have been added Montana Territory and Washington Territory, in addition to Alabama and Texas.

The courts which adopt the doctrine of constructive fraud have been spoken of as positive witnesses, and those which reject it as negative witnesses, upon this subject; thus hinting to an unwarranted inference that the testimony of the latter courts is not entitled to the weight that should be accorded to that of the former. Article in 2 South. Law Rev. 769. But this is not the case of a number of witnesses who have seen a certain act, and testify of their own knowledge against other witnesses, who testify that they did not see the act. There is no analogy whatever between courts passing upon this question of law and witnesses so testifying to facts.

It is submitted that the state tribunals that have adhered to the safe and just rule, that fraudulent intent is in all cases a question of fact, are not regarded anywhere as speaking with less weight of authority than the other state tribunals that have revived the old rejected doctrine of constructive fraud.

It might be said that the courts which have adopted the rule of constructive fraud have either not known what fraud is, or have doubted their ability to aid in the discovery and detection of it in particular instances, and therefore have invented this new arrangement, or easy method of finding out where fraud is, by making a fixed rule, that if an instrument contains a certain provision, the parties who made it shall be regarded as having conclusively intended to defraud somebody, whether they knew it or not.

¹ People's Sav. Bank v. Bates (U. S.), 7 Sup. Ct. Rep. 679.

from fraud in fact? — Constructive or presumptive fraud is an inference of law. When certain facts indicating fraud are established, there is a probability that fraud has been committed. This inference is deduced from the common experience of mankind. But there are different degrees of presumption applicable to different facts. The inference of fraud may conclusively follow certain facts, while other facts indicating fraud are open to explanation. In the one case, fraud is self-evident upon the face of the facts proved; while in the other, a probability of fraud exists until it is discovered that there was no fraud in fact. In the one case, it is the province of the court to adjudge the existence of fraud as a matter of law; but when the presumption of fraud may be disputed, it is the province of the jury to determine, from all the evidence, whether the inference of fraud is false; but if no rebutting evidence be offered, the court in this case also will adjudge the existence of fraud as matter of law.¹

By the Roman law of the classical period, there was no such thing as absolute presumptions of law, or irrebuttable presumptions. The utmost extent to which presumptions were carried was to determine thereby the burden of proof. Arbitrary presumptions, which determine the effect of evidence rather than the burden of proof, were an invention of the scholastic civilians of the Middle Ages. "Business, in the old sense, was extinct; and courts no longer met to hear arguments on the application of principles to a concrete case." Speculations upon jurisprudence were based upon an imaginary, and not on an actual, humanity. The jurists made ideas realities, and they made men unrealities. "In the place of the real man, as he might happen to appear on the trial, they set up an ideal man, who was to be always presumed, no matter what be the evidence, to have specific, unvarying attributes. In like manner, to every act which might be the object of litigation they attached other attributes. Every man was presumed to act from a routine motive. Every act was presumed to have been done with a routine intent."

Such is the account of the origin of the doctrine of presumptions given by Dr. Wharton;² and continuing the history, the learned author says: "The term *præsumptio juris et de jure*, which was introduced by the glossators of the twelfth and thir-

¹ See Bigelow on Fraud, 468, 474.

² 2 Whart. on Ev. ch. 14.

teenth centuries, was originally intended to express an intense presumption. Much difficulty had been felt in finding suitable limits for such 'superlative' presumptions. At last it was concluded to get rid of all doubt as to their force by making them irrebuttable, and it was announced that presumptions *juris et de jure* were presumptions which did not admit of judicial disproof." Commenting upon the assignment of irrebuttability to presumptions, he says that this doctrine is as repugnant to the practical jurisprudence of business life as it is to the philosophical jurisprudence of Rome, and that nothing should be left of it beyond express statutory prescriptions and the leading axioms of the law, which are really the necessary principles from which jurisprudence starts.¹

417. There are instruments which by statute are declared to be fraudulent upon their face, — instruments whose provisions are such that they cannot be reconciled with honesty of purpose. The instruments against which this inference has been most frequently invoked have been general assignments by insolvent debtors. As the rules applying to these require an unreversed surrender of property, with no resulting benefits to the debtor until his debts are paid, the arrangement, if these primary rules are plainly violated, cannot be reconciled with fairness. The bankruptcy and insolvency laws make all assignments and conveyances by insolvent debtors void in law, under certain circumstances. But, outside of such general assignments and such conveyances under the bankruptcy and insolvency laws, the cases proper for declaring the existence of fraud in law which cannot be explained or disproved are few, if any such exist.²

418. Formerly an absolute sale of goods without delivery of possession was deemed fraudulent in law *per se*, both in England and in most of the American states; but this doctrine has been overturned in England and in several American states where it had formerly prevailed, so that now the prevailing doctrine is, that a sale without delivery of possession is only *prima facie* fraudulent, and may be explained to be a *bona fide* trans-

¹ And such is the doctrine of the modern civil law, as stated by the best German and French writers. ² Per Campbell, J., in *Gay v. Bidwell*, 7 Mich. 519.

action. In several of the states the old rule remains because it has been enacted by statute; while in others it is adhered to by the courts because it was too firmly established by the early decisions to be overturned by judicial action; and the courts feel obliged to content themselves with expressions of dissatisfaction, while they strictly confine the rule to that class of cases to which it has already been authoritatively extended. Thus in Kentucky it was said in one case,¹ that the tendency of modern decisions in that as well as in other states has been to leave the question of fraud open to investigation, and to be determined by all the facts which tend to show the actual intention with which the conveyance was executed; and in another case,² the doctrine of fraud *per se* was characterized as arbitrary and inconsistent with the harmony of legal science.³

It should be a cardinal rule in the interpretation of instruments never to infer a dishonest meaning if an honest one is possible and consistent with the whole tenor of the instrument.⁴ An arbitrary rule, declaring void all mortgages of personal property containing provisions that the mortgagor may retain possession and sell in the usual course of business, must have the effect of annulling very many transactions which are without fraud in fact; and it is confidently believed and asserted that such a rule prevents or annuls a hundred honest transactions for each one that is dishonest. It is not the true policy of the law to declare void, under an absolute and unchangeable presumption, instruments which are ordinarily, or even in numerous cases, reconcilable with an honest and legal intent. At most such instruments should raise only a presumption of fraud, which the party claiming the benefit

¹ *Enders v. Williams*, 1 Metc. 346, 352.

² *Daniel v. Morrison*, 6 Dana, 182, 185.

³ Both these observations are repeated and enforced in *Vanmeter v. Estill*, 78 Ky. 456; *S. C.* 1 Ky. Law Reporter, 32. See §§ 319, 320.

⁴ *Nye v. Van Husan*, 6 Mich. 329; *Gay v. Bidwell*, 7 Mich. 519, per Campbell, J.

In *Lister v. Simpson*, 38 N. J. Eq. 438, Van Fleet, V. C., delivering the opinion, after stating the reasoning of the cases which hold that a power of disposal given to a mortgagor of merchandise renders the mortgage conclusively fraudulent, said: "This reasoning, it will be perceived, pro-

ceeds upon the theory that because such a mortgage may be used by a dishonest debtor with great facility as a means to defraud his creditors, therefore all such contracts should, for reasons of public policy, be subject to a conclusive presumption that they are fraudulent, whether they are so in fact or not. This reverses that cardinal rule which declares that fraud shall not be presumed but must be proved, and places the court in a position where it may be compelled, in obedience to a purely artificial rule, to declare a mortgage to be fraudulent which is not so in truth, but which is perfectly honest."

of the instrument may rebut; and the better rule, it is submitted, in regard to the instruments under consideration, is, that they are *prima facie* legal and honest, and that illegality and fraud in them must be made out by those who attack them. In either case, the question of fraud is one for the jury, to be determined from all the facts. Each transaction then stands upon its own merits.

419. The objection that facts not appearing upon the face of the instrument are presumed, in order to help out this presumption of fraud, may be urged against the rule that a fraud upon creditors shall be inferred, as a matter of law, from a provision that a mortgagor may remain in possession, and dispose of goods in the course of his business. Mr. Justice Campbell, considering the presumptions which may arise upon such a mortgage, inquires: ¹ "How can any one, from the face of this mortgage, and without reference to extraneous facts, draw any conclusion whatever concerning either its intent or its bearing upon creditors? It would certainly be valid, under any circumstances, if there were no creditors. It does not appear from the mortgage that there were any. It would not injure other creditors if they were abundantly secured. It does not show they were not. It would not be void if they had authorized it. And many other cases might be suggested showing that without proof of external facts there could be no conclusive presumption at all."

420. The strongest argument, perhaps, against the validity of such a mortgage is, that a power in the mortgagor to dispose

¹ Gay v. Bidwell, 7 Mich. 519. See, also, Oliver v. Eaton, 7 Mich. 108, and dissenting opinion of Mullet, J., in Griswold v. Sheldon, 4 N. Y. 581. To like effect it is declared, in a recent case before the Supreme Court of North Carolina, that "to find fraud, as a matter of law, it must so expressly and plainly appear in the deed itself as to be incapable of explanation by evidence *dehors*. If the deed of mortgage had expressed that there were other outstanding debts unsecured by the deed, and that the property therein conveyed was all the bargainor possessed, then, with the reservation of the posses-

sion contained in this instrument (coupled with a power of disposal), the court would hold that such a deed was fraudulent and void on its face. But the court cannot so declare where it is possible to show by extraneous evidence that the mortgage was executed in good faith, and for a legal purpose. If, for instance, it could be shown that, when this deed was made, the mortgagor owed no other debts, or that, owing them, he had other property outside of the mortgage, and liable to execution, amply sufficient to pay them, as matter of law the deed must be upheld." Cheatham v. Hawkins, 76 N. C. 335.

of the property for his own benefit makes him the substantial owner of the property. Such a power is likened to a general power of appointment, which makes the donee of the power the substantial owner of the property; and is likened also to a power of revocation reserved to a grantor, which makes the grantor the substantial owner of the property.¹

One objection to this argument, however, is, that it assumes a power of disposition in the mortgagor such as is never given, — namely, a power to dispose of the whole property at once, whereas the power of disposal in such mortgages is merely that the mortgagor may sell in the ordinary course of trade. Permission to the mortgagor to sell goods at retail is permission to free small portions of the goods, from time to time, from the incumbrance of the mortgage. It may be that a power reserved by the mortgagor to dispose of the entire stock of goods absolutely, for his own benefit, might well be regarded as rendering the instrument void. The grant might well be regarded as nugatory, and the mortgagor as remaining the substantial owner of the property. Such a reservation, moreover, would bear upon its face the badge of fraud; for it would render the mortgagee's security altogether worthless, and not merely decrease his security, as in the case of a power reserved to sell the goods in the usual course of a trader's business. There is very little authority, however, for holding that a mortgage which reserves to the mortgagor a right to continue selling the mortgaged goods is entirely inoperative as a transfer between the parties. Where this doctrine has been declared, it has had special reference to future acquisitions, upon which it was contemplated the mortgage should take effect. Such a mortgage has been regarded as void because it is not a certain security upon specific property.² Generally, it may be said that a mortgage with a right in the mortgagor to sell the goods in the usual way is not objected to as inoperative to convey the goods, but on the ground of fraud.

421. It has been objected that a mortgage of a stock of goods, with possession and power of disposal in the mortgagor, is no better than a mortgage of a specific article, — as for instance, a horse, — with authority in the mortgagor to sell it;

¹ Article by Mr. Bump, in 4 Cent. L. J. 219.

² Collins v. Myers, 16 Ohio, 547.

that the use of the word *stock* does not preserve the identity of the property; that the word is not a thing; and that such a mortgage is, in effect, a mortgage of a word instead of a substance; and while the substance is permitted to be sold, the mortgage attaches and remains fixed only to the word.¹ But it is not claimed that the word *stock* represents a fixed thing, which retains its identity even when renewed by the substitution of new articles, the same as a horse preserves his identity, although in the process of time every particle composing him may be thrown off and renewed. That would be poor philosophy and bad law. In determining the question of fraud in such a mortgage, it is immaterial whether the mortgage is framed to attach to additions made to stock or not. It is argued that a mortgage giving possession and a power of disposition of the property to the mortgagor is nothing, in the last analysis of the transaction, but a reliance upon the honesty of the mortgagor, and, in fact, is no security, because it is within the power of the mortgagor, at any moment, to defeat the mortgage lien by an entire disposition of the whole property covered by the mortgage; that such a mortgage, being no security to the creditor, is of no benefit except to ward off other creditors.² This argument is valid when applied to a mortgage of a specific article with such a power of disposition; but it is doubtful whether even such a mortgage should be regarded as absolutely void. It should rather be regarded as valid between the parties until it is defeated by a sale by the mortgagor; and as against his creditors it should be regarded at most as only presumptively fraudulent.

422. But the doctrine that is supported by the authorities relates to mortgages of such property as stocks of merchandise, which the owners dispose of in the ordinary course of business; and the power of disposal on the part of the mortgagor which is here contended for is not a power which would allow the mortgagor to sell the entire mortgaged property at once, and wholly defeat the mortgage, but a power to sell in the ordinary and usual course of trade of the mortgagor. Under such a power of disposal, the mortgagor could not, if he would, make a valid sale of the entire property at once. The mortgage being duly

¹ *Collins v. Myers*, 16 Ohio, 547, per Read, J. ² *Ibid.*

recorded, a purchaser would have legal notice of the extent of the power of sale reserved to the mortgagor, and he would know that a sale of the entire property would be subject to the mortgage lien just as much as if the mortgage contained no authority whatever in the mortgagor to sell. Under such a power, any sale by the mortgagor, not in the usual course of his business, would be fraudulent and void, whether the sale be of the entire property or of a large part of it.

Thus a trader mortgaged his stock in trade by a bill of sale, with a proviso that until default he should be entitled to make use of such stock without hindrance on the part of the mortgagee, and afterwards sold the goods by private contract and absconded. The jury found that he sold the goods fraudulently and not in the ordinary course of his business, but the purchaser bought in good faith. It was held that the mortgagee was entitled to the goods as against such purchaser, for the right of the mortgagor to deal with the goods was subject to the implied condition that the dealing should be only in the ordinary course of his business.¹

When a mortgagor is permitted to remain in possession of the goods, and disposes of them in the ordinary course of trade, the goods sold under such permission are discharged from the lien of the mortgage.² The mortgagor may well enough be regarded as the agent of the mortgagee in making the sales and in receiving the purchase money.³ "This principle would not apply to the case of the sale of an entire stock of goods, out of the ordinary course of trade, by the mortgagor, unless the mortgagor had been permitted, with the express knowledge of the mortgagee, to

¹ Taylor v. M'Keand, 5 C. P. D. 358.

² See §§ 458, 459.

³ Again, as remarked by Judge Campbell, in delivering the judgment of the Supreme Court of Michigan in a recent case (*People v. Bristol*, 35 Mich. 28), the doctrine concerning the effect of giving permission to the mortgagor to dispose of his goods in the usual way, may depend somewhat upon the view taken of the nature of the mortgage. Where the theory is held that a mortgage is a mere security, and not a transfer of title, and that the mortgaged chattels do not cease to belong to the mortgagor until some steps have

been taken to end his right by the enforcement of the mortgage, the mortgagor, while remaining in possession, is not the agent of the mortgagee, but the owner of the incumbered property. Permission to sell at retail is permission to pass title free from incumbrance, but it cannot be regarded in any sense as a payment to himself as agent, by himself as agent, of a debt due by himself as principal. His debt remains unpaid until it is paid to the creditor, who has simply released a portion of the goods from his mortgage, and incurred so much risk.

hold himself out to the world as the owner of the property unincumbered by any mortgage.”¹

423. Public policy. — There is still another view of the effect of a provision in a mortgage of a stock of goods that the mortgagor may sell in the usual course of trade, and the mortgage shall attach to new goods bought to keep up the stock, and this is, that, irrespective of fraud, such a mortgage is against public policy, throwing open too wide a door for possible fraud; and is void, because it does not fall within that class of cases of which a court of equity will decree the specific performance. This doctrine is clearly and ably stated by Chancellor Cooper, of Tennessee, in a recent decision, in which, upon this ground, he declared void *per se* a mortgage conveying a stock of goods, together with any other goods which might from time to time, during the existence of the security, be purchased by the mortgagor and put into his store to replace any part of the stock which might have been disposed of, or to increase or enlarge the stock then on hand.² He starts with the principle that a conveyance of property not *in esse* can be sustained in equity only upon the principle that the contract is one of which a court of equity would decree specific performance. Upon this principle he concedes that a mortgage which simply applies to after-acquired property, or which gives a limited power of disposition of specific articles, with a view to replacement by similar articles, — such as the machinery and tools of a manufacturing company, or the rolling stock of a railroad, — or which covers the return cargo of a ship freighted for foreign commerce, is unobjectionable. But when, in a purely private transaction, a mortgage lien is sought to be created on personal goods, the only profitable use of which is as articles of commerce, and an unlimited power of disposition is reserved to the mortgagor, he declares that the contract is not one which a court of equity will enforce. Such a mortgage does not create an absolute lien on any property, but, as has been said, a fluctuating lien, which opens to release that which is sold, and to take in what may be newly purchased. The contract is invalid at law, and not enforceable in equity.

¹ *Miller v. Pancoast*, 29 N. J. L. 250, followed in *Lund v. Fletcher*, 39 Ark. 325, 335. See the well-considered opinion per Whelpley, C. J.

² *Phelps v. Murray*, 2 Tenn. Ch. 746; of Eakin, J.; and in *Bank of Rome v. S. C.* 4 Cent. L. J. 583. Approved and *Haselton* 15 Lea, 216.

This view of the subject is entitled to candid consideration. If a mortgage of the class under consideration is to be declared void at all, this may be a rational ground upon which to declare it so. This view does away with the presumption of fraud in such cases, which is a presumption unfounded in experience and reason, and is "in conflict with the general rule that the question of fraud arising out of the retention of possession by the grantor, with power of disposition, is one of fact, to be determined by the circumstances of the particular case."

To this objection, that a right of sale of a stock in trade reserved to the mortgagor is against the policy of the law, Judge Story replies:¹ "I am not aware of any policy of the law, or of any principle of law, which makes any conveyance of this sort invalid as to creditors, if they have full notice, or may have full notice of it by the exercise of reasonable diligence. Indeed, the law makes the registration of the deed constructive notice of its contents to all persons, since it was required to be registered, and was registered in conformity to law. What ground is there, then, to assert that the conveyance was against the policy of the law? The phrase itself is somewhat indefinite, and, in its actual application here, is difficult to be grasped and comprehended. I profess that I am not able to perceive any; and, so far as authorities go, they point the other way."

424. What, then, is this doctrine of constructive fraud, as applied to chattel mortgages by the American courts? Are the courts which are supposed to have adopted the doctrine in accord as to what the doctrine is? Stated in its broadest terms, it is said that a mortgage of a merchant's or manufacturer's stock, accompanied by an agreement, whether in the mortgage or not, or whether made at the same time or subsequently, that the mortgagor may continue to dispose of it, is conclusively fraudulent in law, and void as to the mortgagor's creditors; and such agreement is proved by evidence of sales made by the mortgagor with the knowledge of the mortgagee, and without objection on his part. This is the doctrine as it was formerly announced and maintained by the courts of New Hampshire, though the later decisions in that state have in some measure modified the earlier doctrine.

¹ *Mitchell v. Winslow*, 2 Story, 630, 647.

If, now, we turn to the courts of New York, from which the doctrine was undoubtedly adopted by most of the other courts, we find several modifications: *First*. If the agreement be not contained in the mortgage itself, the question whether there is any such agreement, and what are the indications of fraud arising from it, is one for the jury. *Second*. If the agreement be to sell for cash for the benefit of the mortgagee, the mortgage is no longer conclusively fraudulent, but only raises a question of good faith for the jury. *Third*. The mere fact that the mortgagor continues to sell the mortgaged goods with the knowledge of the mortgagee, is not proof of an agreement between the parties for such sales, and does not render the mortgage fraudulent in law. *Fourth*. The fact that the mortgage provides that the mortgagor may make sales, and use the proceeds in replenishing his stock, does not render the instrument void on its face.

In Illinois the same modifications are adopted, excepting the fourth, and perhaps the second, above named; and the further qualifications are made that such a mortgage may be good in part and void in part, — good in so far as it covers property of which the mortgagor has no power of disposal, and void as to the part over which he has such power. Moreover, in this state, and in Ohio as well, if the mortgagee takes possession of the property before the rights of creditors intervene, his possession is not vitiated by the vicious provision in the mortgage. In New York, however, these two further modifications are rejected in express decisions upon them.

In Minnesota, Mississippi, Missouri, Nebraska, and Ohio, as well as in New York and Illinois, if the agreement or intent that the mortgagor may dispose of the mortgaged goods be not contained in the mortgage itself, the existence of such intent is a question for the jury, and the court cannot pronounce the mortgage fraudulent *per se*.

The qualification that an agreement that the mortgagor may sell for the sole benefit of the mortgagee, without making the mortgage conclusively fraudulent, prevails not only in New York, but also in Colorado, Minnesota, Missouri, New Hampshire, and Ohio; and Mr. Justice Davis, in *Robinson v. Elliott*, said: "We are not prepared to say that a mortgage under the Indiana statute would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express

purpose of applying the proceeds to the payment of the mortgage debt." ¹

After all these qualifications of the rule, what is there of value left of it?

It has been justly declared that "the difference between an agreement on the face of the instrument and one proved *aliunde* does not afford room for any distinctions as to the question of fraud in law." But the most vital infringement upon the doctrine is that which allows the mortgagor to retain possession of the goods, with an agreement to apply the proceeds of sales to the payment of the mortgage debt, without making the mortgage conclusively fraudulent. This whole doctrine of fraud arising from the mortgagor's possession and power of disposal was designed to guard against secret trusts. As was said in *Twyne's* case: "Fraud is always apparelled and clad with a trust, and trust is the cover of fraud." Is there any the less a trust between the parties when the mortgage provides that the mortgagor shall apply the proceeds of all sales to the mortgage debt, than there is when it says nothing about such application? The proceeds of the sales are in the mortgagor's hands, and the mortgage lien does not cover them. If a mortgagor's retention of a power of disposal of the mortgaged goods is inconsistent with the idea of a security, is the inconsistency any the less when the mortgagor agrees to use the proceeds, not for his own benefit, but for the benefit of the mortgagee? Is not the distinction a mere shadow?

425. In conclusion, in regard to this and all the other qualifications of the doctrine, it seems just to say that they have been made because the courts have wished to avoid the wrongs and hardships that would be wrought by adhering to the rule that the mortgagor's possession, with right to sell, makes the mortgage conclusively fraudulent. As a matter of experience and observation, the courts must have seen that such mortgages are no more likely to be fraudulent in fact than any other; and they must have seen that in a mercantile or manufacturing community, if not elsewhere, the doctrine works badly, and is contrary to sound

¹ But the courts of *Indiana*, as we have seen, have gone far beyond this qualification, and have declared the question of fraud in all cases to be one of intent. § 387. See *Lund v. Fletcher*, 39 Ark. 325, 334, per *Eakin, J.*

policy. In relation to the policy of this doctrine, Judge Campbell, of Michigan, uses the following language:¹ “No court has given any satisfactory reason why such a provision should necessarily vitiate a chattel mortgage, although it is undoubtedly liable to abuse. The recording law enables all vigilant persons to ascertain the existence of such securities. Many small merchants, especially beginners in business, have no other means of securing their creditors for the stock they purchase, and can only meet their debts out of current sales. If any creditor is likely to be injured by allowing the debtor to dispose of the mortgaged property, it is rather the creditor whose security is thus cut down, than the one who has no claim upon the specific property. To hold that a merchant cannot mortgage his goods without closing his doors would be to hold that no mortgage of a merchant’s stock can be made at all.”

The conclusions deduced from the foregoing examination of this subject are: That the doctrine of absolute fraud arising in a mortgage of merchandise from the mortgagor’s retaining possession, with a power of disposal in the usual course of trade, is not supported by any preponderance of authority; that it is contrary to sound principles of jurisprudence; that it has no reason for its existence, derived from general observation and experience; that it is contrary to sound policy; and that the qualifications of the doctrine made by leading courts have in large measure destroyed its force, and are indicative that these courts wish themselves well rid of the whole of it.

¹ *Gay v. Bidwell*, 7 Mich. 519, 525.

CHAPTER X.

THE RIGHTS OF THE PARTIES BEFORE FORFEITURE.

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I. The Right of Possession as between the Parties.

426. The right of possession of mortgaged chattels vests in the mortgagee immediately upon the execution of the mortgage if there be no express or implied stipulation in it to the contrary, whether the mortgage debt be due and payable or not.¹ The mortgage vests the title to the chattel in the mort-

¹ *Lippincott v. Shaw Carriage Co.* 34 Fed. Rep. 570, 574; *S. C.* 25 Ib. 577. **Massachusetts:** *Brackett v. Bullard*, 12 Met. 308; *Holly v. Huggefords*, 8 Pick. 73. **Maine:** *Pickard v. Low*, 15 Me. 48; *Flanders v. Barstow*, 18 Me. 357; *Pierce v. Stevens*, 30 Me. 184; *Ramsdell v. Tewksbury*, 73 Me. 197, 199; *Holmes v. Sprowl*, 31 Me. 73; *Stewart v. Hanson*, 35 Me. 506; *Woodman v. Chesley*, 39 Me. 45. **Indiana:** *Fay v. Burditt*, 81 Ind. 433, 437; *Case v. Winship*, 4 Blackf. 425; *Broadhead v. McKay*, 46 Ind. 595; *Johnson v. Simpson*, 77 Ind. 412. **Connecticut:** *Pease v. Odenkirchen*, 42 Conn. 415, 425; *Clark v. Whitaker*, 18 Conn. 543. **Alabama:** *Street v. Sinclair*, 16 Cent. L. J. 53; *Ellington v. Charleston*, 51 Ala. 166; *Brown v. Lipscomb*, 9 Porter, 472, 475; *Ross v. Ross*, 21 Ala. 322; *Hefin v. Slay*, 78 Ala. 180. **Missouri:** *Williams v. Rorer*, 7 Mo. 556; *Robinson v. Campbell*, 8 Mo. 365. **Maryland:** *Jamieson v. Bruce*, 6 G. & J. 72; *McGuire v. Benoit*, 33 Md. 181. **California:** *Wildman v. Radenaker*, 20 Cal. 615; *Wilson v. Brannan*, 27 Cal. 258. **New York:** *Langdon v. Buel*, 9 Wend. 80, 83; *Burdick v. McVanner*, 2 Den. 170; *Fuller v. Acker*, 1 Hill, 473, 475; *Smith v. Acker*, 23 Wend. 654, 667; *Patchin v. Pierce*, 12 Ib. 62; *Willner v. Morrell*, 8 J. & S. 222; *Shuart v. Taylor*, 7 How. Pr. 251; *Chadwick v. Lamb*, 29 Barb. 518; *Mattison v. Baucus*, 1 N. Y. 295. **New Hampshire:** *Ferguson v. Clifford*, 37 N. H. 86; *Leach v. Kimball*, 34 N. H. 568. **New Jersey:** *Miller v. Pancoast*, 29 N. J. L. 250; *Sanderson v. Price*, 1 Zab. 637, 646. **Illinois:** *Whisler v. Roberts*, 19 Ill. 274; *Nelson v. Wheelock*, 46 Ill. 25; *Frank v. Miner*, 50 Ill. 444; *Chipron v. Feikert*, 68 Ill. 284; *Constant v. Matteson*, 22 Ill. 546. **Arkansas:** *Kan-nady v. McCarron*, 18 Ark. 166. **Kansas:** *Hamlyn v. Boulter*, 15 Kans. 376; *Wolfley v. Rising*, 12 Kans. 535. **Mississippi:**

gagee; not an absolute title, indeed, but a present title, defeasible upon a condition subsequent. "As a general rule, the right of possession follows the right of property; and therefore, where there is no restraining stipulation, the mortgagee having the right of property until defeated by the performance of the condition, has as incident thereto the right of possession, and may therefore take the goods into his own custody, or maintain trespass or trover for them against any one who takes or converts them to his own use." ¹

The right of possession follows as incident to the right of property, unless the mortgage expressly or impliedly provides that the possession shall remain with the mortgagor until a breach of the condition. In the absence of such a stipulation the right of possession passes immediately to the mortgagee, and the possession of the mortgagor is the possession of the mortgagee.² If there be such a stipulation, the right of possession follows the right of property upon a breach of the condition. When the mortgagee is entitled to the possession of the property, the mortgagor, having no right to the possession as against the mortgagee or his assigns, cannot maintain an action of tort in the nature of trover for a conversion of the property.³ A reservation of possession in favor of the mortgagor only affects the possession according to the terms of the reservation, the title to the property in the mean time remaining in the mortgagee, who becomes entitled to possession immediately upon breach of the condition.⁴

Thornhill v. Gilmer, 4 Sm. & M. 153. Ohio: Bates v. Wiles, 1 Handy, 532; Robinson v. Fitch, 26 Ohio St. 659. Iowa: Bean v. Barney, 10 Iowa, 498. Minnesota: Fletcher v. Neudeck, 30 Minn. 125; 14 N. W. Rep. 513; Mann v. Flower, 25 Minn. 500. Vermont: Longey v. Leach, 57 Vt. 377. Michigan: Daggett v. McClintock, 56 Mich. 51; Haynes v. Leppig, 40 Mich. 602. In Iowa, R. Code 1880, § 1927; Kansas, *supra*, § 205; and Arkansas, *supra*, § 192, it is declared by statute that, in the absence of stipulations to the contrary, the mortgagee has the legal title and the right of possession.

In Colorado the court, without deciding as to the exact moment when the title vests in the mortgagee, say that when he

has lawfully taken possession, the legal title is in him for the purpose of subjecting the property to the payment of the debt. Hammond v. Solliday, 8 Colo. 610, 613.

¹ Coles v. Clark, 3 Cush. (Mass.) 399, 402, per Chief Justice Shaw; and see Hall v. Sampson, 35 N. Y. 274, 277, per Porter, J., to same effect.

² Boise v. Knox, 10 Met. (Mass.) 40; Landon v. Emmons, 97 Mass. 37; Kellogg v. Olson, 34 Minn. 103; Lee v. Fox, 113 Ind. 98.

³ Holmes v. Bell, 3 Cush. (Mass.) 322, 324; Goodrich v. Willard, 2 Gray (Mass.), 203; Leach v. Kimball, 34 N. H. 568.

⁴ Robinson v. Fitch, *supra*; Lindemann v. Ingham, 36 Ohio St. 1, 9; Burns v. Campbell, 71 Ala. 271.

427. **Exceptions to this rule.** — In Michigan a chattel mortgage does not transfer the legal title to the property until after foreclosure, or something equivalent to that; and this must usually be by sale. The true relation of the parties is that of debtor on the one side, and creditor secured by lien on property upon the other.¹ But a mortgagee who has obtained possession cannot be deprived of it by the mortgagor or a purchaser from him without payment or tender of payment.²

A mortgage being a mere security and not a transfer of title, the mortgagee cannot maintain assumpsit for the value of the mortgaged goods when they have been seized by a creditor of the mortgagor and applied to the satisfaction of his claim. Only an owner can maintain assumpsit. The mortgagee's remedy for an injury to his security is an action upon the case.³

In Mississippi the provision of the Code⁴ declaring that the mortgagor is the owner of the legal title of property conveyed by mortgage or deed of trust, except as against the mortgagee and his assignee or trustee after breach of condition, applies to personal as well as real estate. After condition broken, the mortgagee may pursue his legal remedy and assert his legal title by reducing the chattels to possession, in any appropriate action; although upon obtaining possession he holds the property as mortgagee for the purpose of converting it into money by a sale to discharge the debt secured, until the equity of redemption is cut off by such sale. But before condition broken, the mortgagee cannot recover possession of the property by replevin or detinue; for to recover in such an action the mortgagee must have the right of immediate possession, either by virtue of a general property as owner, or of a special property as bailee, and the mortgagee has neither.⁵ His

¹ Kohl v. Lynn, 34 Mich. 360; Lucking v. Wesson, 25 Mich. 443; Baxter v. Spencer, 33 Mich. 325; Cary v. Hewitt, 26 Mich. 228; Flanders v. Chamberlain, 24 Mich. 305; People v. Bristol, 35 Mich. 28; Warner v. Beebe, 47 Mich. 435.

² Paulus v. Nunn, 48 Mich. 190.

³ Randall v. Higbee, 37 Mich. 40; People v. Bristol, *supra*; Carpenter v. Graham, 42 Mich. 191; S. C. 3 N. W. Rep. 974; affirmed, 46 Mich. 531.

⁴ R. Code 1880, § 1204.

Although a deed of trust provides that

if the debt be not paid at maturity it shall be the duty of the trustee, upon request of the creditor, to take possession of the property and sell it, the trustee is not entitled to the possession of the property upon mere default in payment of the debt, and has no cause of action to recover it until requested by the creditor to take possession for the purpose of sale. Bowman v. Roberts, 58 Miss. 126.

⁵ Buck v. Payne, 52 Miss. 271, 280; and see Elson v. Barrier, 56 Miss. 394.

only remedy for protecting the property against loss is to apply to a court of chancery for the exercise of its restraining power.

In Missouri it is held that a trustee or mortgagee is not entitled to possession until after default made or condition broken. If before that time he is justly apprehensive that the property will be lost or destroyed, he is not without remedy; but his remedy does not consist in an action for possession.¹

In Dakota Territory² and in New Mexico Territory,³ it is provided by statute that in the absence of stipulation to the contrary the mortgagor of real or personal property has the right of possession thereof.

428. A provision allowing the mortgagor to remain in possession gives him a legal and exclusive right of possession until the event occurs whereby he loses such right. The mortgagor's possession is a legal right, and not a mere covenant. Neither is he in such case a mere bailee, but an owner with a right of possession.⁴ But the stipulation that the mortgagor may retain possession until condition broken, is personal to the mortgagor and cannot be assigned or transferred to another; therefore, if the mortgaged chattels be found in possession of another, without further license or authority, the mortgagee as the legal owner may recover possession.⁵

When the mortgaged property is rightfully in the possession of the mortgagor, and by the terms of the mortgage no right has accrued to the mortgagee to take possession of it, the mortgagee has no right to enter the mortgagor's house in his absence and take away the property, without license express or implied from the mortgagor, although he believed and had cause to believe that the mortgagor did not mean to return to the house.⁶ A right to enter the premises of the mortgagor, without legal process, is not essential to the security of the mortgagee of personal property. Permission to do so is not implied, therefore, from the existence of that relation alone.⁷

¹ *Barnett v. Timberlake*, 57 Mo. 499; *banks v. Bloomfield*, 5 Duer (N. Y.), 434; *Sheble v. Curdt*, 56 Mo. 437.

² R. Code 1877, § 1733.

³ Comp. Laws 1884, § 1593.

⁴ *Fenn v. Bittleston*, 21 L. J. (N. S.) Ex. 41; *S. C.* 8 Eng. L. & Eq. 483; *Fair-*

⁵ *Levi v. Legg*, 23 S. C. 282.

⁶ *McLeod v. Jones*, 105 Mass. 403.

⁷ *Per Wells, J.*, in *McLeod v. Jones*, *supra*. Otherwise after foreclosure. *McNeal v. Emerson*, 15 Gray (Mass.), 384.

The fact that a mortgagor is in possession and control of the property is *prima facie* evidence of his right of possession ; and a third person cannot impeach that right without producing the evidence by which it would appear that the possession was wrongful, or that the right had been lawfully divested.¹

Whether parol evidence is admissible to prove that at the time of making the mortgage it was agreed that the mortgagor should continue in possession until he should fail to perform the condition of the mortgage is a question upon which the authorities are not agreed ; for while there are cases which hold that such evidence is not admissible, there are others which declare it to be admissible because such an agreement does not contradict the written mortgage.²

429. The mortgage generally defines the circumstances under which the right of possession shall vest in the mortgagee, and this right is always subject to any agreements the parties may make regarding it.³ The default of the mortgagor in paying the principal or interest of the debt secured is usually the event that is fixed upon to terminate his right of possession ; but other circumstances may equally well be made the occasion of his forfeiting the right of possession. Ordinarily a surety holding a mortgage of indemnity is not entitled to possession under the mortgage until he has paid the principal debt, or some part of it, unless the mortgage gives possession before default.⁴ But under a mortgage to a surety conditioned that he shall be entitled to possession if the debt be not paid at maturity, the surety is entitled to possession without paying the mortgage debt.⁵ The mortgagee may be authorized to take possession " whenever he may choose so to do," and then he may assert this right at his will.⁶ The mortgage may authorize him to take possession whenever he may deem himself unsafe, and then the mortgagor's possessory right will terminate whenever the mortgagee in good faith exercises his discretionary authority in taking possession.⁷ In like

¹ Rogers v. King, 66 Barb. (N. Y.) 495.

⁴ Stonebraker v. Ford, 81 Mo. 532.

² Case v. Winship 4 Blackf. (Ind.) 425 ;
Colman v. Packard, 16 Mass. 39 ; Pierce
v. Stevens, 30 Me. 184 ; and see Ripley v.
Dolbier, 18 Me. 382.

⁵ Mattingly v. Paul, 88 Ind. 95.

⁶ Wells v. Chapman, 59 Iowa, 658 ; 13
N. W. Rep. 841.

⁷ Hall v. Sampson, 35 N. Y. 274 ; Cline
v. Libby, 46 Wis. 123.

⁸ Jamieson v. Bruce, 6 G. & J. (Md.)
72, 75.

manner, the mortgagee may be authorized to take possession in case the mortgagor attempt to remove or dispose of the property; and in that case the mortgagee may take possession of the property or take it in a replevin suit, although the time of payment of the debt secured by the mortgage has not arrived.¹

Authority may be given to the mortgagee to take possession of a mortgaged stock of goods if an unreasonable depreciation of the stock occurs; and in that case a depreciation of one half by failure to replenish the stock will authorize the mortgagee to take possession.²

In a mortgage by a manufacturer a provision may be inserted that a suspension of operations shall be regarded as a breach of the condition of the mortgage, whereupon the mortgagee may take possession; but to entitle the mortgagee to exercise this right, the proof of such suspension should be clear.³

A clause in a mortgage that "the above property vests in mortgagee when mortgagor attempts to defraud," though somewhat uncertain in its meaning when taken by itself, was construed, with reference to the whole instrument and the attending circumstances, to mean that the mortgagee should have the right to the possession of the property in the event that the mortgagor attempted to defraud him by some act having a tendency to defeat the mortgage security.⁴

A clause empowering a mortgagee to take possession should the mortgagor become embarrassed in his affairs, or in case any action at law should be commenced against him, is not controlled by a subsequent proviso that it should be lawful for the mortgagor to retain possession until default in payment.⁵

¹ *Russell v. Butterfield*, 21 Wend. (N. Y.) 300.

² *St. Louis Drug Co. v. Robinson*, 10 Mo. App. 588; affirmed, 81 Mo. 18.

³ *Anderson v. Holmes*, 14 S. C. 162.

⁴ *Sidener v. Bible*, 43 Ind. 230.

⁵ *National Guardian Ass. Co. ex parte*, 10 Ch. D. 408. *James, L. J.*, in delivering his decision, said: "The mortgagees became the legal owners of the goods, and as such would have the right to take possession of them. Then there is a proviso in the usual form that the mortgagor shall be entitled to retain possession until

default be made by him in payment according to the covenant and proviso contained in the deed. That is to say, the mortgagor had a kind of term in the goods granted to him by way of a charge upon the absolute ownership of the mortgagee. But in the same deed there is an express provision enabling the mortgagees, on the happening of a number of different contingencies, to take possession of the goods and to sell them. It is impossible to conceive that this express provision was intended to be entirely abrogated by the subsequent authority to the borrower to

A provision in a chattel mortgage that the mortgagor may retain the possession and use of the property until the maturity of the debt, but in case the same or any part thereof shall be levied on or attached or claimed by any other person at any time before the payment of the money secured, or in case the mortgagor shall sell or attempt to sell the property without the consent of the mortgagee, that the latter shall then have the right to take immediate and full possession of the whole of the property, is valid.¹ So is a provision that the mortgagor may retain the possession and use of the property, with the right in the mortgagee to take possession at any time he may deem himself in danger of losing his debt, or any part thereof, by delaying the collection thereof until its maturity;² or that he may take immediate possession of the property at any time he may feel himself "unsafe or insecure" before the maturity of the debt.³

In Washington Territory a mortgage of personal property where a debt for the security of which the mortgage has been given has become due, or, if the debt is not yet due, and the mortgagee has reasonable ground to believe that his debt is insecure, and that by allowing the property longer to remain in the hands of the mortgagor he would be in danger of losing his debt or security, may have the property taken from the possession of the mortgagor and sold in the manner provided for the foreclosure of such a mortgage.⁴

430. If the parties make an express stipulation in regard to possession, that determines their rights. Thus where a mortgage secured the payment of two notes, one payable in three months and the other in six months, and provided "that until default in the conditions and covenants therein contained, and until the non-payment of said two promissory notes at maturity, the mortgagor should possess and use the property thereby mortgaged;" and further, "that upon default as aforesaid to pay said

hold possession except in one contingency. There is no magic in the position of the clauses in the deed; every clause is part and parcel of the bargain between the parties."

¹ *Prior v. White*, 12 Ill. 261; *Beach v. Derby*, 19 Ill. 617; *Wilson v. Rountree*, 72 Ill. 570; *Pike v. Colvin*, 67 Ill. 227;

Eddy v. Kenney, 5 Mont. 502, 504; *Bryan v. Smith*, 13 Daly (N. Y.), 331.

² *Fox v. Kitton*, 19 Ill. 519, 521.

³ *Bailey v. Godfrey*, 54 Ill. 507; *Lewis v. D'Arcy*, 71 Ill. 648; *Durfee v. Grinnell*, 69 Ill. 371; *Jorgensen v. Tait*, 26 Minn. 327.

⁴ Code 1881, § 1989.

notes and perform said covenants, the mortgagee, his personal representatives and assigns, might take immediate possession of the property," it was held that the mortgagor could not be deprived of his right of possession upon default in the payment of the note first maturing, but that his right of possession continued until default upon the other note as well; for by the terms of the provision, possession was to be retained by the mortgagor "until the non-payment of said two promissory notes at maturity."¹

When to the clause providing that the mortgagor shall retain possession until default were added the words, "but always at the will of the mortgagee," it was held that these words did not change the character of the instrument, and authorize the mortgagee to take possession at will; for this would be contrary to the general intention to be collected from the whole context of the instrument, which is to govern in preference to any particular expression.²

Under a stipulation that upon default of any part of the debt, the whole shall become "immediately due, at the option of the holder," the holder is not bound to elect immediately after default, but may do so at any time.³

Under a mortgage which merely authorizes the mortgagee, for further security, to take possession, he is not entitled to sell the property before default.⁴

Under a mortgage which authorizes the mortgagee to take possession in case the mortgagor should sell or dispose of the whole or any part of the stock of goods which is the subject of the mortgage, a sale of a portion of the goods by the mortgagor to pay an existing debt would give the mortgagee the right of possession, although the mortgagor may have had the right to make sales in the ordinary course of retail business.⁵

It has even been held that under a deed of trust which provides that if the debt is not paid at maturity it shall be the duty of the trustee, upon request of the creditor, to take possession of the property and sell it, the trustee is not entitled to the possession of the property upon mere default in payment of the debt, and

¹ *McGuire v. Benoit*, 33 Md. 181.

² *Anderson v. Holmes*, 14 S. C. 162.

³ *Wheeler & Wilson Manufac. Co. v. Howard*, 28 Fed. Rep. 741.

⁴ *Schwallback v. Chicago, M. & St. P.*

R. R. Co. 69 Wis. 292; *Bank of Carroll v. Taylor*, 67 Iowa, 572.

⁵ *Laing v. Perrott*, 14 Mich. 298; *S. C.* 12 N. W. Rep. 192.

has no cause of action to recover it until requested by the creditor to take possession for the purpose of sale.¹

431. A provision that the mortgagee may take possession whenever he shall deem himself insecure is for his benefit, and authorizes him to take possession when, in his judgment, he deems it best for his safety to do so; and upon his taking possession before default no proof is required to show that he considered himself unsafe, as the legal presumption is that such was the fact.² He is made the sole judge of the happening of the contingency upon which he may take possession.³ Though he takes possession two days after the mortgage was executed, this does not show the mortgage to be fraudulent, though it is a proper fact to be considered upon the question of fraud.⁴ It is immaterial whether his apprehension of loss be well or ill founded.⁵ Being entitled to possession of the property for such cause, he may maintain an action for the possession of it against any one who detains it,⁶ or trover for the conversion of it.⁷ He may, moreover, take possession without making any previous demand for payment.⁸

Such a clause vests in the mortgagee an absolute discretion to take possession of the property whenever he may deem himself insecure, and the exercise of this right does not depend upon the fact that he has reasonable ground for deeming himself insecure. Nor is such a contract a hard and unconscionable one, especially as the right of possession passes with the legal title by force of the mortgage, in the absence of any agreement to the contrary. When the parties have made their own contract, the courts will

¹ *Bowman v. Roberts*, 58 Miss. 126.

² *Cline v. Libby*, 46 Wis. 123; *Huebner v. Koebke*, 42 Wis. 319; *Smith v. Post*, 1 Hun (N. Y.), 516; and see *Durfee v. Grinnell*, 69 Ill. 371; *Fox v. Kitton*, 19 Ill. 519; *Evans v. Graham*, 50 Wis. 450, 453; *S. C.* 15 Am. Law Rev. 154; *S. C.* Wis. Leg. News, Dec. 23, 1880; *Braley v. Byrnes*, 21 Minn. 483; *Werner v. Bergman*, 28 Kans. 60, 63; *Gage v. Wayland*, 67 Wis. 566; 31 N. W. Rep. 108.

³ *Bailey v. Godfrey*, 54 Ill. 507; *Bank of Carroll v. Taylor*, 67 Iowa, 572; *Lewis v. D'Arcy*, 71 Ill. 648; *Allen v. Vose*, 34 Hun (N. Y.), 57, where the cases are examined at length. In these cases there

was evidence that the mortgagee was in danger of loss, or that he thought he was. See last clause of this section.

⁴ *Hoey v. Pierron*, 67 Wis. 262.

⁵ *Huebner v. Koebke*, *supra*; *Roy v. Goings*, 96 Ill. 361. This provision is equivalent to giving the mortgagee the right of possession whenever he chooses to demand it. *Gage v. Wayland*, *supra*.

⁶ *Frisbee v. Langworthy*, 11 Wis. 375; *Welch v. Sackett*, 12 Wis. 243.

⁷ *Grove v. Wise*, 39 Mich. 161; *Harvey v. McAdams*, 32 Mich. 472.

⁸ *Huggans v. Fryer*, 1 Lans. (N. Y.) 276.

not set that aside and make a new one for them.¹ Such a provision in a mortgage is a contract right, and therefore it cannot be impaired by subsequent legislation.²

Under a clause authorizing the mortgagee to take possession whenever he should deem himself insecure, he is entitled to exercise this right if he has good reason to think and did think that he had been overreached in regard to the value of the property.³

But in some states it is held that if the mortgagee take possession for any reason other than default in payment he must have a reasonable apprehension of insecurity, or danger of losing his debt by delaying its collection until its maturity, or of waste or removal of the goods.⁴ And if he take possession without such

¹ *Cline v. Libby*, 46 Wis. 123.

² *Boice v. Boice*, 27 Minn. 371. This case arose under a statute enacted in Minnesota in 1879, which provides that "No mortgagee, nor any one claiming under him, shall have any right, arbitrary or without just cause based upon the actual existence of facts, to declare any of the conditions or stipulations of a mortgage broken prior to the time of default in the payment of such mortgage, or prior to the time when the conditions of such mortgage should be performed." Laws 1879, ch. 65, § 2.

In *Werner v. Bergman*, 28 Kans. 60, 64, Valentine, J., said: "If the mortgagor wishes to retain possession of the property until the mortgagee shall have reasonable grounds to deem himself insecure, he can insert, or have inserted, a stipulation to that effect in the mortgage; or if he wishes to go still further, and retain possession of the property until the mortgagee shall become in fact insecure, he can have a stipulation put into the mortgage to that effect. But if he chooses only to have inserted in the mortgage a clause that he shall have the right to the possession of the property until the mortgagee shall deem himself insecure, then he can only retain the property until the mortgagee does in fact deem himself insecure; and he has no right to question the grounds upon which the mortgagee entertains such feelings of insecurity. He cannot say to

the mortgagee, 'You are unreasonable; you have no right to feel insecure; there are in fact no grounds for such feelings of insecurity.' The only question at all material in such a case is, whether the mortgagee does so feel; and if the mortgagee claims that he has such a feeling, and afterward on the trial testifies that at the time he took possession of the property he had such a feeling, and if upon the facts of the case it is possible at all to believe that any person, however timid and fearful he might be, might have had such a feeling, then it should be held that the mortgagee had a right to take possession of the property."

³ *Botsford v. Murphy*, 47 Mich. 536; *S. C.* 13 Rep. 336.

⁴ *Furlong v. Cox*, 77 Ill. 293; *Davenport v. Ledger*, 80 Ill. 574; *Roy v. Goings*, 96 Ill. 361. Distinguished from *Bailey v. Godfrey*, and *Lewis v. D'Arcy*, 71 Ill. 648. The cases in this state are reviewed in *Roy v. Goings*, *supra*, and the law of the subject is summarized by Dickey, C. J., as follows: "The mortgagee under such a mortgage had the right to judge of the crisis for himself, subject only to the limitation that his judgment must be exercised in good faith and upon reasonable grounds. This means reasonable ground, or probable cause, to think, or believe, or feel that there was danger which rendered the taking of the property by him proper under the agreement. This does not re-

reasonable apprehension, he will be liable to the mortgagor in trespass; and if the property be retaken by replevin by the mortgagor, the proper measure of the latter's damages will be the difference between the market value of the property at the time when it was first taken and its market value when retaken by replevin, together with such actual loss to business as may be proved as the direct result of the first taking; and if the first taking was malicious, the jury may also give exemplary damages.¹ The taking possession of the property at an unusual hour of the evening of the day the mortgage was executed, without previous notice, is a strong circumstance showing malice;² but if such possession was taken by an agent, the mortgagee, to disprove the inference of malice, may prove his directions to the agent as to taking possession.

Another view of the effect of this clause is that the mortgagee should, in taking possession under it, act in good faith and upon facts arising since the making of the mortgage which lead him to deem himself in danger of loss. The mortgagee may himself testify as to his own apprehensions. This view differs on the one hand from the decisions which allow the mortgagee to act from the mere dictates of his own will, or at his absolute discretion; and on the other hand it differs from those decisions which hold that the mortgagee can act only on grounds that he can show to a court to be reasonable.³

432. The right of the mortgagor to remain in possession

quire that there should be actual danger, or that the proofs should furnish the court, at the time of the trial, with reasonable grounds to decide that there was actual danger. It was sufficient if, at the trial, it appeared that at the time of the taking there was apparent danger, such that a reasonable man *might* in good faith act upon it; in other words, there should be reasonable grounds to believe that there was danger, or that he did not act without probable cause. . . . In such case the mere fact that the mortgagee declares that he feels himself unsafe and insecure is not conclusive. When that question is put in issue, and it appears from the proofs that the mortgagee had no

probable cause or reasonable grounds to feel himself unsafe and insecure, the taking must be held unlawful; but it is not essential in such case that there should be real cause of danger. It is not necessary that the debt should, in fact, be unsafe or insecure. It is sufficient for this purpose that the circumstances are such that a reasonable man, thus situated, might in good faith believe himself unsafe and insecure."

So, also, in *Nebraska*: *Newlean v. Olson*, 22 Neb. 717; 36 N. W. Rep. 155.

See, *contra*, *Huebner v. Koebeke*, 42 Wis. 319; *Cline v. Libby*, 46 Wis. 123.

¹ *Davenport v. Ledger*, 80 Ill. 574.

² *Davenport v. Ledger*, *supra*.

³ *Barrett v. Hart*, 42 Ohio St. 41.

of the mortgaged property may be implied from provisions defining the circumstances under which the right of possession is to vest in the mortgagee. Such provisions impliedly qualify the mortgagee's right, as legal owner, to the immediate possession of the property. Thus a safety clause in a mortgage, that is, one which authorizes the mortgagee to take possession whenever he shall deem himself insecure, implies the mortgagor's right of possession until the mortgagee in good faith demands the goods under this clause.¹

Such provisions, in connection with a clause providing that the mortgagor should keep the property in repair, imply that the mortgagor is to retain possession until the debt becomes due, notwithstanding the erasure of the express clause permitting the mortgagor to remain in possession.²

A stipulation in a mortgage of a horse that the mortgagor shall feed the animal is not sufficient to show that he was to retain possession, when it also appears that he was to use the horse in cultivating lands rented from the mortgagee, and that he has abandoned the lands.³ A provision that the mortgagee shall have power to enter and take possession of the property and sell it for the purpose of paying the debt, "provided the same should not be paid at maturity," does not deprive the mortgagee of the right of immediate possession of the property. Such a provision does not touch the general authority of the mortgagee to take possession at any time, but enables him to enforce payment after maturity sooner than he otherwise could under the statute.⁴

433. Possession under insecurity clause. — Under such a clause the levy of an execution upon the mortgaged chattels as the property of the mortgagor gives the mortgagee a clear right to treat the condition of the mortgage as broken, and to reclaim possession by replevin or otherwise, both as against the mortgagor and the officer making the levy. It does not matter that the levy was rightfully made while the property was in the hands of the mortgagor. There is no hardship in this rule, because the mortgagee would be compelled to offer the property for sale at once,

¹ *Hall v. Sampson*, 35 N. Y. 274, overruling, on this point, *Rich v. Milk*, 20 Barb. 616; *Chadwick v. Lamb*, 29 Ib. 518. See, also, *Hathaway v. Brayman*, 42 N. Y. 322; *Letcher v. Norton*, 4 Scam. (Ill.) 575; *Sherman v. Clark*, 24 Minn. 37.

² *Babcock v. McFarland*, 43 Ill. 381.

³ *Ellington v. Charleston*, 51 Ala. 166.

⁴ *Ferguson v. Thomas*, 26 Me. 499.

and any surplus there might be after satisfying his debt would be subject to the execution.¹

If the mortgagor sell the property without the knowledge of the mortgagee, the latter, under such a provision, may immediately maintain an action of trover against the purchaser.² In such case, if the mortgage embrace other property not sold, it is not essential to the right of recovery against the purchaser that the mortgagee should show that such other property was insufficient to satisfy the mortgage debt, or that he had been unable to reduce such remaining property to possession.³

Under a provision that the mortgagor may remain in possession unless he or some other person should attempt to sell, remove, or otherwise dispose of the property, a seizure of the property on a distress warrant for rent due from the mortgagor entitles the mortgagee to immediate possession;⁴ and so does the levy of an execution upon the property and the removal of it from the mortgagor's possession.⁵

434. A mortgagor cannot maintain trespass against a mortgagee rightfully in possession of the property, for he has neither the property nor any right of possession. Although the mortgagee sell the property in a manner not prescribed by statute, he does not become a trespasser *ab initio*, or forfeit his title under the mortgage, and consequently the mortgagor cannot maintain trespass. His remedy is by an action on the case,⁶ or by bill to redeem. To an action of trespass by the mortgagor against the mortgagee for entering the mortgagor's premises and carrying away the mortgaged chattels, it is a good defence that the mortgage had become forfeited.⁷ This rule applies with greater force to cases where the mortgage contains a power of sale vesting in the mortgagee an irrevocable license to enter and take possession of the mortgaged property upon default.⁸

¹ Lewis v. D'Arcy, 71 Ill. 648; Beach v. Derby, 19 Ill. 617; Frisbee v. Langworthy, 11 Wis. 375; Welch v. Sackett, 12 Wis. 243.

² Bailey v. Godfrey, 54 Ill. 507; Jorgensen v. Tait, 26 Minn. 327.

³ Bailey v. Godfrey, *supra*.

⁴ Conkey v. Hart, 14 N. Y. 22; Carpenter v. Town, Hill & Den. Supp. (N. Y.)

72; Russell v. Butterfield, 21 Wend. (N. Y.) 300.

⁵ Ashley v. Wright, 19 Ohio St. 291.

⁶ Leach v. Kimball, 34 N. H. 568.

⁷ Nichols v. Webster, 1 Chand. (Wis.) 203; McNeal v. Emerson, 15 Gray (Mass.), 384; Burns v. Campbell, 71 Ala. 271.

Text quoted with approval in Street v. Sinclair (Ala. 1882), 15 Rep. 168; S. C. 16 Cent. L. J. 53.

⁸ Street v. Sinclair, *supra*.

435. Neither can the mortgagor maintain trover against a mortgagee rightfully in possession. The action of trover depends upon title either general or special for its support, and therefore a mortgagor, having no title, cannot maintain the action against the mortgagee for refusing to deliver the property. His only right is to redeem in equity.¹ It does not avail the mortgagor in such suit to show that the mortgage has been paid, or that the liability which the mortgage was given to indemnify the mortgagee against has terminated without loss to him.²

A second mortgagee is in this respect in the same position as the mortgagor. So long as the possession remains with the first mortgagee, the second mortgagee cannot sustain an action of trover against him, by showing on the trial that the debt secured by the first mortgage had been satisfied before bringing the suit. The second mortgagee has neither a special title resulting from possession nor the legal title with the right of possession.³

A sale of the entire property by the mortgagee, entitled to possession, before foreclosure, does not amount to a conversion of it for which the mortgagor may maintain an action in the nature of trover.⁴ Of a case which apparently holds the contrary to this,⁵ it is to be observed that the sale there made was of a part only of the mortgaged property, which might perhaps be held to be inconsistent with the mortgagor's right of redemption, and with his creditor's right of attachment.

Neither can a subsequent mortgagee, who occupies the same legal position as the mortgagor in respect to a prior mortgagee, maintain an action for conversion against a purchaser to whom the prior mortgagee in possession, or entitled to possession, has sold the entire property.⁶

Where there was an absolute bill of sale which the grantor claimed was intended to operate by way of mortgage, but the grantee claimed it was intended to be an absolute sale, and accordingly took possession of the property as absolute owner, denying that he held it by virtue of the mortgage, upon a finding

¹ *Holmes v. Bell*, 3 Cush. (Mass.) 322, 323; *Brown v. Bement*, 8 Johns. (N. Y.) 96; *Burdick v. McVanner*, 2 Den. (N. Y.) 170, 171; *Heyland v. Badger*, 35 Cal. 404.

² *Holmes v. Bell*, *supra*.

³ *Hume v. Breck*, 4 Litt. (Ky.) 285.

⁴ *Landon v. Emmons*, 97 Mass. 37, per Gray, J.; *Wells v. Connable*, 138 Mass. 513.

⁵ *Spaulding v. Barnes*, 4 Gray (Mass.), 330.

⁶ *Landon v. Emmons*, *supra*.

by a jury that there was no sale,¹ the grantor was allowed to maintain trover. It would not be safe, however, to follow this precedent; for if the grantor claims that the transaction is a mortgage, it would seem that his only proper remedy is by bill to redeem.

But if the mortgagee fraudulently and in bad faith takes possession of the mortgaged property and sells it, he is guilty of a conversion, and liable to the mortgagor in trover. It was so held in a case where the mortgagee took possession of the property under a clause which authorized him to take the property into his possession as further security at any time he thought proper, and after he had taken possession the mortgagor tendered him the full amount of the mortgage debt with interest; but the mortgagee proceeded nevertheless to sell the property though the debt had not matured.²

436. The mortgagor cannot maintain replevin against a mortgagee who has obtained possession of the property for a breach of condition of the mortgage, upon the ground that the consideration of the mortgage was illegal.³ He cannot recover back the property any more than he could recover back money after paying it upon an illegal contract. The maxim, *Potior est conditio possidentis*, is applicable in all such cases.⁴ And so where a mortgagee having become insolvent, an officer took possession of the mortgaged property as messenger, under a warrant which was void, and afterwards, the condition of the mortgage having in the mean time been broken, the officer delivered the property to the assignee under a valid warrant, it was held that the mortgagor could not maintain replevin against the officer, for he was no longer in possession; nor against the assignee, for he held the rights and title of the mortgagee.⁵

If, however, the mortgage be void, the mortgagor may maintain replevin for the property although it be in the possession of the mortgagee.⁶

Where a mortgagor brought replevin against the mortgagee for the mortgaged property, and the latter set up the mortgage and

¹ Clark v. Rideout, 39 N. H. 238.

² Harder v. Hosp (Wis.), 34 N. W. Rep. 145.

³ Dougherty v. Bonavia, 124 Mass. 210;

Fikes v. Manchester, 43 Ill. 379; Hutt v. Bruckman, 55 Ill. 441.

⁴ King v. Green, 6 Allen (Mass.), 139.

⁵ Hall v. White, 106 Mass. 599.

⁶ McCartney v. Wilson, 17 Kans. 294.

notes, and alleged a default in the payment of the note last maturing, and the mortgagor replied that the notes were given on a purchase from the mortgagee of the mortgaged property in respect to which there was a warranty, and that the damages arising from the breach of the warranty equalled in amount the note remaining unpaid, and sought to have such damages applied in extinguishment of that note, it was held in Illinois that the replication was good, and that the matters involved therein could be properly adjusted in such action of replevin.¹

437. But a mortgagee is liable in trespass or trover to a mortgagor for wrongfully disturbing the latter's possession. Thus, a mortgagor who has by the terms of the mortgage the right to remain in possession until default may maintain trover or trespass against the mortgagee if he disturbs his possession before default.² The measure of damages in such case is the value of the right of possession until forfeiture of the condition of the mortgage, and the value of the property after payment of the mortgage debt.³ Special damages can be recovered only when they are alleged and claimed in the declaration.⁴ Consequential damages cannot be recovered. Thus, if a mortgagee take possession of a mule before default, he is answerable only for any reasonable use to which the mule could have been put, and not for an injury to a crop for the cultivation of which the mule was needed. Such an injury is too remote.⁵

In case a mortgagee unlawfully takes possession of the mortgaged goods after they have been lawfully attached by a creditor of the mortgagor, the rule of damages in replevin by the sheriff is the value of the property over and above the mortgage debt.⁶

A sale of the mortgaged property by the mortgagee before foreclosure is a conversion, for which he is liable to the mortgagor.⁷ Even after default the mortgagor may, according to some authori-

¹ *Hutt v. Bruckman*, 55 Ill. 441.

² *Ford v. Ransom*, 39 How. (N. Y.) Pr. 429; *S. C.* 8 Abb. Pr. N. S. 416; *Hall v. Sampson*, 35 N. Y. 274; *Pierce v. Hasbrouck*, 49 Ill. 23; *Niven v. Burke*, 82 Ind. 455.

³ *Brown v. Phillips*, 3 Bush (Ky.), 656; and see *Russell v. Butterfield*, 21 Wend. (N. Y.) 300; *Blodgett v. Blodgett*, 48 Vt.

32; *Brink v. Freoff*, 44 Mich. 69; *S. C.* 6 N. W. Rep. 94; *Street v. Sinclair* (Ala. 1882), 16 Cent. L. J. 53.

⁴ *Brink v. Freoff*, *supra*; *Street v. Sinclair*, *supra*.

⁵ *Jackson v. Hall*, 84 N. C. 489.

⁶ *Saxton v. Williams*, 15 Wis. 292.

⁷ *Spaulding v. Barnes*, 4 Gray (Mass.), 330; *Mathews v. Fisk*, 64 Me. 101.

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ties, maintain trespass against the mortgagee for taking possession of the property, if he can show that the mortgage has been satisfied; and to show satisfaction he may prove payments made by him after forfeiture, but before the mortgagee took possession.¹

No one but the mortgagor, or some one having his title, can object to the mortgagee's taking possession before he has a right to do so by the terms of the mortgage. The objection cannot be taken by a third person who had no interest in the property at the time possession was taken.²

438. The mortgagor may in a proper case have the mortgagee enjoined from taking possession. Thus, when a mortgagor has the right to retain possession for a stipulated period, he may by an injunction prevent the mortgagee's taking possession before the expiration of the time limited.³ But when the mortgagee has the right to take possession and sell whenever he may deem himself insecure, the mortgagor cannot restrain him by an injunctive order, and require him to accept a tender of additional security for the mortgage debt. The mortgagee, under such a clause in a mortgage, has a right to assert his possession, and a court of equity will not interfere.⁴

439. A receiver will not be appointed over a mortgagee in possession, where he upon oath claims a balance due him, much less where the debtor himself states such a balance, and admits

¹ Thornton v. Cochran, 51 Ala. 415.

² Gaar v. Hurd, 92 Ill. 315; McConnell v. Scott, 67 Ill. 274.

³ Ford v. Ransom, 8 Abb. Pr. (N. Y.) N. S. 416.

⁴ Cline v. Libby, 46 Wis. 123. In support of the position that a court of equity could properly exercise its jurisdiction to restrain the mortgagor from exercising his legal right, and to the point that a court of equity will not enforce penalties but relieve against them, the case of Williamson v. New Albany R. R. Co. 1 Biss. 198, was cited. In that case Judge McLean made a remark to the effect that where there is a hard and unconscionable contract, a court of equity will withhold its aid, and leave the party to his remedy

at law. All this is familiar doctrine, but it has no application to the point under consideration. "Here," says Mr. Justice Cole, "the mortgagee is not seeking the aid of a court of equity to enforce the contract; nor is there any ground for saying that the clause in the mortgage in regard to the defendant's taking possession of the property, when she deemed herself insecure, is a hard or unconscionable agreement. The execution of a chattel mortgage vests in the mortgagee the legal title, subject to be defeated by the performance of the condition. . . . But we have not been referred to any case where an injunction was granted to restrain the mortgagee from asserting his possessory right under a clause in the mortgage like the one in question."

that the property is an inadequate security for such balance.¹ A receiver of the mortgagor's estate appointed while the possession remains in the mortgagor may have control, subject to the mortgage lien.² A mortgagee will not be restrained by injunction from selling the property after default, to reimburse himself for the debt secured, unless there be an allegation of irresponsibility on his part and danger of loss to the mortgagor. The fact that there are unsettled accounts between the parties, or that the mortgagor has a claim, which if valid might be set off against the sum due on the mortgage, will not entitle him to an injunction against the mortgagee's selling, or to the appointment of a receiver to make the sale and keep the proceeds until the accounts are settled between the parties, so long as the mortgagor's claims are not established, or the amount thereof adjusted.³

The appointment of a receiver of mortgaged chattels held by a mortgagee in possession will only be made in cases of pressing and apparent necessity, in order to secure the rights of the mortgagor or others claiming under him. To make the appointment in any other case is to impair the obligation of the contract between the parties to the mortgage, and is therefore beyond the constitutional powers of both the court and the legislature.⁴

A mortgagee in possession will not be dispossessed by the appointment of a receiver, on the ground that the property in controversy is a newspaper and printing establishment, which it may be desirable to sell as an active business in actual operation.⁵

The appointment of a receiver does not divest the lien of a prior mortgagee, but is made subject to his rights. Neither does a sale of the property by a receiver appointed in a suit between partners for a settlement of the partnership business affect the paramount mortgage lien of a stranger to the record.⁶

440. As against third persons who have taken the mortgaged property from the custody of the mortgagor, when he has the right of possession by the terms of the deed, he alone can maintain an action for the recovery of it. The mortgagee cannot maintain

¹ Bayaud v. Fellows, 28 Barb. (N. Y.) 451; Quinn v. Brittain, 3 Edw. (N. Y.) 314; Hammond v. Solliday, 8 Colo. 610.

² Hammond v. Solliday, *supra*.

³ Bayaud v. Fellows, *supra*.

⁴ Patten v. Accessory Transit Co. 4 Abb. (N. Y.) Pr. 235.

⁵ Rapier v. Gulf City Paper Co. 64 Ala. 330.

⁶ Lorch v. Aultman, 75 Ind. 162.

such an action because he has no present right of possession.¹ He cannot maintain a possessory action against an officer who has levied upon the mortgaged chattels as the property of the mortgagor.² Yet, contrary to this, it has been held by other courts that a provision that the mortgagor may retain possession until maturity of the debt, unless he does some act inconsistent with the object of the deed, does not affect the mortgagee's right of possession as against third persons; and he may therefore recover the property before default from one who takes it out of the mortgagor's possession.³

A mortgagor entitled to possession may maintain trover or trespass against a third person who has taken the property from him, and may recover more than nominal damages.⁴

Even after condition broken, a mortgagor who has been allowed by the mortgagee to remain in possession may maintain trover against a third person who has wrongfully converted the property.⁵

If the property is exempt from execution, the renunciation of the privilege of exemption does not extend beyond the operation of the mortgage itself, and the mortgagor may maintain an action against the officer who wrongfully seizes and sells the property on execution, or he may maintain an action upon an indemnifying bond.⁶

441. A mortgagor cannot be made to account, either at law or in equity, for profits arising out of his use of the mortgaged property.⁷ The profits received, even if he has specially agreed to account for them, constitute only a debt, and not a trust. The creditor can recover no more than the debt secured. He has a personal claim upon the mortgagor for this, and it would be futile for him to have or to enforce a personal obligation for the profits,

¹ *Fenn v. Bittleston*, 21 L. J. (N. S.) Ex. 41; *S. C.* 8 Eng. L. & Eq. 483; *Fairbanks v. Bloomfield*, 5 Duer (N. Y.), 434; *Hamilton v. Mitchell*, 6 Blackf. (Ind.) 131; *Laubenheimer v. McDermott*, 5 Mon. T. 512; *Brickley v. Walker*, 68 Wis. 563.

² *Shinners v. Brill*, 38 Wis. 648,

³ *McLeod v. Bernhold*, 32 Ark. 671.

And see §§ 446, 447.

⁴ *Tallman v. Jones*, 13 Kans. 438;

Gregory v. Northern Pacific Lumbering Co. 15 Oregon, 447; *Ganong v. Green* (Mich.), 31 N. W. Rep. 461.

⁵ *Buddington v. Mastbrook*, 17 Mo. App. 577.

⁶ *Evans v. St. Paul Harvester Works*, 63 Iowa, 204; *Collett v. Jones*, 2 B. Mon. (Ky.) 19.

⁷ *Stewart v. Fry*, 3 Ala. 573; *Graves v. Sayre*, 5 B. Mon. (Ky.) 390.

which, if paid, must go to pay the mortgage debt. Such profits received in the lifetime of the mortgagor, and carried into his general funds, cannot, after his death, be reached by the mortgagee as a trust. But a contract in the mortgage to apply the profits to the extinguishment of the mortgage debt is binding on the personal representatives of the mortgagor, and if profits are received by such representatives from the use of the chattel after the mortgagor's death, he is not to consider them as general assets of the estate, but to account for them as a trust.¹

442. A mortgagee may maintain replevin against the mortgagor for the property before the maturity of the mortgage debt, if there be no agreement in the mortgage that the mortgagor shall retain possession.² In such action the mortgagee should aver his title under the mortgage, and his right of possession. It is not sufficient for him to aver that he has a chattel mortgage, as this does not necessarily imply that the mortgagor is not entitled to possession.³ It is a sufficient defence to such action, that by the terms of the mortgage the mortgagor is entitled to possession.⁴ The mortgagee may maintain replevin, although the debt secured be not due, if there be a clause in the mortgage authorizing him to take possession of the property and sell it whenever he shall deem himself insecure.⁵ But in such case he has not constructive possession of the property until he has done some act asserting his right under this provision.⁶ He may also maintain replevin before default, upon the mortgagor's removing or selling the property contrary to a provision in the mortgage giving the mortgagee the right to take possession and sell the property upon such removal or sale.⁷

A mortgagee before condition broken, under a mortgage which by its terms entitles the mortgagor to retain the possession and use of the property until the maturity of the debt, cannot main-

¹ *Stewart v. Fry*, 3 Ala. 573; *North v. Drayton*, Harper (S. C.) Ch. 34.

² *Ferguson v. Thomas*, 26 Me. 499; *Pickard v. Low*, 15 Me. 48; *Mertens v. Kielmann*, 79 Mo. 412; *Kellogg v. Olsen*, 34 Minn. 103.

³ *Johnson v. Simpson*, 77 Ind. 412. But he need not allege the non-payment of the debt which the mortgage was given

to secure. *Person v. Wright*, 35 Ark. 169.

⁴ *Redman v. Hendricks*, 1 Sandf. (N. Y.) 32; *Ingraham v. Martin*, 15 Me. 373.

⁵ *Frisbee v. Langworthy*, 11 Wis. 375; *Chadwick v. Lamb*, 29 Barb. (N. Y.) 518; *Lewis v. D'Arcy*, 71 Ill. 648.

⁶ *Skiff v. Solace*, 23 Vt. 279.

⁷ *Russell v. Butterfield*, 21 Wend. (N. Y.) 300.

tain replevin for the property, because a right to the immediate possession is essential to this action.¹ But under a mortgage containing no provision that the mortgagor shall retain possession, the mortgagee may maintain replevin for the property at any time.² And so under a mortgage containing an express stipulation that if the mortgagor should commit waste, or misuse, or attempt to secrete or remove the property, the mortgagee should be authorized to take immediate possession, if an execution be levied upon the property at the suit of another creditor of the mortgagor, and the property be removed from the mortgagor's possession and away from the place of his residence, the mortgagee may maintain replevin for the property, for such removal is regarded as a breach of the condition upon which the mortgagor's right of possession depended.³

But under a provision that if the mortgagor should sell or in any way dispose of the mortgaged goods, the mortgagee might take possession of and keep them until default, it was held in New York that an attachment of the goods, without any connivance on the part of the mortgagor, was not a sale or disposal of them, and the mortgagee could not maintain replevin for them.⁴

443. When demand necessary before suit. — To sustain an action by a mortgagee against a mortgagor for an unlawful detention of the mortgaged property, as distinguished from an unlawful taking of it, the mortgagee must show a demand for it and a refusal to deliver it.⁵ But it is held, that no demand by the mortgagee having the right of immediate possession is necessary in order to sustain an action of replevin against a subsequent purchaser from the mortgagor.⁶

In Michigan, where a chattel mortgage is regarded as a security and not a sale, it is said that a replevin suit by a mortgagee against a mortgagor, resting on either a tortious taking or detention, cannot be brought until a demand has been made. Until

¹ *Curd v. Wunder*, 5 Ohio St. 92; *Simmons v. Jenkins*, 76 Ill. 479; *Hathaway v. Brayman*, 42 N. Y. 322. *Calkins v. Clement*, 54 Vt. 635.

² *Pickard v. Low*, 15 Me. 48.

³ *Ashley v. Wright*, 19 Ohio St. 291; *Quinn v. Schmidt*, 91 Ill. 84.

⁴ *Carpenter v. Town, Hill & Den. Supp.* (N. Y.) 72.

⁵ *Roberts v. Norris*, 67 Ind. 386; *Henby v. Forgy*, 7 Ind. 284; *Monnot v. Ibert*, 33 Barb. (N. Y.) 24; *Mertens v. Kielmann*, 79 Mo. 412.

⁶ *Partridge v. Swazey*, 46 Me. 414; *Pease v. Odenkirchen*, 42 Conn. 415; *Braley v. Byrnes*, 20 Minn. 435.

a demand is made by the mortgagee, the mortgagor's possession is rightful.¹ "The contrary doctrine," said Campbell, C. J., "belongs to the old theory of chattel mortgages which treated them as sales and not as securities."

To entitle a mortgagee who has the right of immediate possession to recover for a wrongful conversion of the mortgaged property, no demand is necessary before bringing suit.²

444. A mortgagee or his assignee may bring trover for the mortgaged property without a formal demand, upon the refusal of the person in possession to surrender it upon request, when the mortgagee is entitled to possession. Such a refusal amounts to a conversion of the property.³ The refusal must amount to an absolute denial of the mortgagee's right. A reasonable excuse or apology for not complying immediately, as when the demand is made by an agent, and the party in possession wishes to verify the agent's authority before complying, may so qualify the refusal that it will not amount to a conversion. But if no excuse be given, the refusal need not be expressed. A silent retention of the goods after a distinct demand for their immediate surrender amounts to a conversion of them.⁴ If the mortgagee be entitled to possession he may maintain trover before, as well as after, default.⁵ He may also, at his election, maintain trespass for an injury to his possession.⁶

An agreement for the mortgagor's possession and use of the mortgaged property is violated by the mortgagor's so using it as to unnecessarily injure the property and impair its value; and the mortgagee may thereupon maintain an action of trover before the maturity of the mortgage debt.⁷

Payment of the mortgage, whether made by the mortgagor or by a stranger, voluntarily reverts the title in the mortgagor, and may be pleaded by him in bar of an action of trover by the mort-

¹ *Cadwell v. Pray*, 41 Mich. 307.

² *Moses v. Walker*, 2 Hilt. (N. Y.) 536 ;
Nordman v. Wilkins, 28 Ark. 191.

³ *Brown v. Cook*, 3 E. D. Smith (N. Y.), 123 ; *Cutter v. Copeland*, 18 Me. 127 ;
Badger v. Batavia Paper Mfg. Co. 70 Ill. 302 ; *Montgomery v. Kerr*, 1 Hill (S. C.), 291 ; *Cotton v. Marsh*, 3 Wis. 221 ; *Bates v. Wilbur*, 10 Wis. 415 ; *Fletcher v. Neudeck*, 30 Minn. 125 ; 14 N. W. Rep. 513 ;

Case Threshing Machine Co. v. Campbell,

14 Oregon, 460 ; *Leonard v. Hair*, 133 Mass. 455.

⁴ *Monnot v. Ibert*, 33 Barb. (N. Y.) 24.

⁵ *Spriggs v. Camp*, 2 Speers (S. C.), 181.

⁶ *Cotton v. Marsh*, *supra* ; *Bates v. Wilbur*, *supra* ; *Cotton v. Watkins*, 6 Wis. 629.

⁷ *Ripley v. Dolbier*, 18 Me. 382.

gagee.¹ And so, although the debt be not paid, the mortgagor may plead in bar to such action a parol release of the mortgage.² If the defendant sets up the defence of payment, the burden of proving it is upon him.³

445. Pleading and evidence. — In an action of trover for the conversion of the mortgaged property, the mortgagee need not set out in his declaration the precise nature of his interest in the property. The nature of his title and the evidences of it are matters of evidence merely.⁴ The note and mortgage must be produced and their execution proved; or, if they are not produced, proof of their loss and of their contents is necessary.⁵ When the action is against a third person, as for instance an attaching creditor, and the mortgage fully describes the debt, it is not necessary to prove the contents of the note, by producing and proving the note itself, in order to sustain the mortgage.⁶ The mortgage itself is in such case evidence of property in the mortgagee.⁷

In such action by the mortgagee against a sheriff who has seized and sold the mortgaged property, upon execution in favor of a creditor of the mortgagor, the defendant may, under the general issue, impeach the mortgage on the ground of fraud. He may, under such issue, prove that the title to the goods is in himself absolutely or as bailee, or that they belong to a third person.⁸ The execution, delivery, and recording of a mortgage do not create a *prima facie* title to personal property as against a person in possession. Such acts are not necessarily acts of dominion over the property itself.⁹ But while a mortgage alone is no evidence of the mortgagor's title to the property, if there is independent evidence that he was in possession when he executed the mortgage, the mortgage is admissible in evidence in an action

¹ *Harrison v. Hicks*, 1 Port. (Ala.) 428; and see *Davis v. Hubbard*, 38 Ala. 185, and *Bellamy v. Doud*, 11 Iowa, 285.

² *Wallis v. Long*, 16 Ala. 738; *Acker v. Bender*, 33 Ala. 230; and see *Barker v. Bell*, 37 Ala. 354.

³ *Brooks v. Briggs*, 32 Me. 447.

⁴ *Harvey v. McAdams*, 32 Mich. 472; *Case Threshing Machine Co. v. Campbell*, 14 Oregon, 460.

⁵ *Flynn v. Hathaway*, 65 Ill. 462; *Huls v. Kimball*, 52 Ill. 391; *Hendrie v. Canadian Bank*, 49 Mich. 401; *Young v. Kimball*, 59 N. H. 446.

⁶ *Quinn v. Schmidt*, 91 Ill. 84.

⁷ *Brooks v. Briggs*, 32 Me. 447.

⁸ *Eureka, etc. Works v. Bresnahan* (Mich.), 33 N. W. Rep. 834.

⁹ *Gibbs v. Childs*, 143 Mass. 103.

of replevin, as showing an act of dominion over the property, and is some evidence of title.¹

446. As against third persons the mortgagor's possession may be the possession of the mortgagee. Thus, if a mortgagee leave the mortgaged property in the mortgagor's possession, under a stipulation in the mortgage that the latter shall retain possession of the property and sell it for the purpose of paying the mortgage debt, he may maintain trover against one who attaches the goods as the property of the mortgagor. His possession under such circumstances is considered the possession of the mortgagee.²

The mortgagee may maintain trover for the conversion of the mortgaged property whilst it was in the possession of the mortgagor.³ For instance, he may maintain this action against an officer who has taken possession of the property by process of attachment, or has levied an execution upon it, as the property of the mortgagor.⁴

If a mortgagee is entitled to possession by the terms of his mortgage, a person who has unlawfully converted the property cannot set up, in defence to the mortgagee's action of trover, a parol understanding between him and the mortgagor that the latter should have possession. Such an understanding is put an end to when a third person converts the property.⁵ It is no objection to the mortgagee's right to immediate possession, after default, that the mortgage provides for the sale of the mortgaged property by a factor to be chosen by the mortgagor. Thus, under a stipulation in a mortgage of a cotton crop that on or before the law-day the mortgagor should ship the cotton to such factor as he might select, who should sell it and pay the mortgagee the amount due him, if the factor appropriate the cotton to his own use and repudiate the title of the mortgagee, the right of the latter to immediate possession attaches on account of this breach of duty, and he may maintain trover for the cotton.⁶

¹ *Eames v. Snell*, 143 Mass. 165.

² *Melody v. Chandler*, 12 Me. 282; and see *Cutter v. Copeland*, 18 Me. 127.

³ *Volney Stamps v. Gilman*, 43 Miss. 456; *Hotchkiss v. Hunt*, 49 Me. 213.

⁴ *Moore v. Murdock*, 26 Cal. 514; *Simmons v. Jenkins*, 76 Ill. 479.

⁵ *Harvey v. McAdams*, 32 Mich. 472.

⁶ *Jones v. Webster*, 48 Ala. 109.

447. A mortgagee may maintain trespass against a stranger, who takes the mortgaged property from the mortgagor, although the mortgage debt be not due.¹ If the property be a building standing upon the land of a third person, the mortgagee may maintain trespass against a person who carries away the materials of the building after it has been pulled down by a trespasser, although the person carrying away the materials was not engaged in pulling the building down.²

Under a stipulation in a mortgage that if the property be attached by a creditor of the mortgagor the mortgagee may take immediate possession, a mortgagee may maintain trespass before default against an officer who makes such an attachment.³

447 a. In many cases either the mortgagee or the mortgagor may maintain a suit against a stranger for injuring or destroying the mortgaged property, or for converting it to his own use. The right of action against a wrong-doer depends upon the plaintiff's title or possession. The registry acts do not affect the determination of the question, for in general they make an unrecorded mortgage void only as to purchasers without notice and as to creditors.⁴ A wrong-doer cannot invoke the protection of the statute as against a mortgagee entitled to possession.⁵ Even in Massachusetts, where the statute declares that an unrecorded mortgage is not valid against any other person than the parties thereto, it is held that a mortgagee whose mortgage is not recorded may maintain an action of tort against one who, without title, takes the property from the possession of the mortgagor, if the mortgagee has, as against the mortgagor, the right of immediate possession.⁶

It has been noticed⁷ that in nearly all the states a mortgage of personal property vests the legal title and a right of possession in the mortgagee, although in many of these same states a mortgage of real property does not vest in him such title or confer any right of possession until a foreclosure sale is had. It follows, therefore, that a mortgagee of personal property may have a right of action

¹ Woodruff v. Halsey, 8 Pick. (Mass.) 333; Longey v. Leach, 57 Vt. 377.

² Woodruff v. Halsey, *supra*.

³ Welch v. Whittemore, 25 Me. 86.

⁴ § 237.

⁵ Moses v. Walker, 2 Hilt. (N. Y.) 536; Johnson v. Jeffries, 30 Mo. 423.

⁶ Pratt v. Harlow, 16 Gray (Mass.), 379.

⁷ § 1.

against a wrong-doer, when a mortgagee of real property, under like circumstances, would not have such right. Thus, in New York, a mortgagee of real property having no title to the land and no right of possession before a foreclosure sale cannot maintain an action against one who negligently injures the mortgaged premises so that the mortgagee has lost his security.¹ But in that state a mortgage of personal property vests the title in the mortgagee and the right of possession, even before default, unless there be a stipulation to the contrary; and after condition broken he always has the right of possession.² Having the right of possession, though he be not in actual possession, he may maintain an action against a stranger for an injury to the property, or for a conversion of it.³

But the mortgagor, if in actual possession, has the same right of action against one who wrongfully injures or converts the mortgaged property, unless the mortgagee has intervened for his own protection.⁴ In this respect the rule is the same as in case of a bailment; namely, either the general owner of the property, or one having a special interest in it, can maintain trespass or case for an injury to it, or trover for a conversion of it. But a judgment recovered by either is a bar to a suit by the other for the same cause of action;⁵ and it would seem that a voluntary payment of damages by the defendant to one would be a bar to a suit by the other.

448. The damages which a mortgagee is entitled to recover is the full value of the property converted at the time of the conversion. He is not obliged to look to the personal responsibility of his debtor, or to show his insolvency, before recovering of the

¹ *Gardner v. Heartt*, 3 Denio (N. Y.), 232; 1 Jones on Mortgages, § 696.

² §§ 426, 699.

³ *Woodruff v. Halsey*, 8 Pick. (Mass.) 333.

⁴ *Woodruff v. Halsey*, *supra*, per Parker, C. J.

⁵ Bacon's Abr. *Trespass and Trover*; *Green v. Clarke*, 12 N. Y. 343, where Gardner, C. J., said: "As the law will not suffer a defendant to be twice harassed for the same cause, only one suit can be brought, and it will be a bar to every

other;" *Chesley v. St. Clair*, 1 N. H. 189, where Richardson, J., said: "There is such a privity between the bailor and the bailee of chattels that a recovery by one in an action of trespass or trover against a stranger for taking the goods is, in general, a bar to an action by the other." For other *dicta* in cases of bailments, see *Story Bailm.* §§ 94, 352; *Smith v. James*, 7 Cow. (N. Y.) 328; *Pico v. Webster*, 12 Cal. 140; *Rindge v. Coleraine*, 11 Gray (Mass.), 157.

wrong-doer. Neither is he required to first look to any other security he may hold.¹ In an action against a stranger who shows no right to the property, the mortgagee may recover the full value, though this exceeds the amount of the mortgage debt.²

In a judgment for a return of chattels wrongfully replevied from a mortgagee, he is entitled to recover any damages suffered from the taking, up to the amount of the mortgage debt; but he cannot have judgment for the full value of the property if that exceeds the mortgage debt and costs.³

A mortgagee is not entitled to recover the value of the use of the mortgaged property, as special damages for its detention. His right to the possession is only for the purpose of foreclosure or sale under the mortgage, in order to satisfy the debt secured by it, and not for the purpose of using the property.⁴

Under codes which allow equitable defences in actions at law, a mortgagor, or any one standing in his place, can, when sued for the mortgaged property, claim the right to redeem; and may mitigate the recovery against him by reducing the judgment to the amount actually due on the mortgage.⁵

449. A mortgagee may bring an action for damages to his reversionary interest, although he has not a right to immediate possession.⁶ Trespass on the case, or trespass, if all distinction between these forms of action be abolished, is a proper form of

¹ *Worthington v. Hanna*, 23 Mich. 530; *Peckinbaugh v. Quillin*, 12 Neb. 586; *S. C.* 12 N. W. Rep. 104; *Morgan v. Kidder*, 55 Vt. 367; *Ganong v. Green* (Mich.), 38 N. W. Rep. 661; *Longey v. Leach*, 57 Vt. 377; *Sherman v. Finch*, 71 Cal. 68.

² *Adamson v. Petersen*, 35 Minn. 529.

³ *Smith v. Phillips*, 47 Wis. 202.

⁴ *Thompson v. Scheid* (Minn.), 38 N. W. Rep. 801.

⁵ *Hinman v. Judson*, 13 Barb. (N. Y.) 629; *Smith v. Konst*, 50 Wis. 360; *S. C.* 7 N. W. Rep. 293; *Lowe v. Wing*, 56 Wis. 31; 13 N. W. Rep. 892; and see *M'Gowen v. Young*, 2 St. & P. (Ala.) 160; *Bailey v. Godfrey*, 54 Ill. 507; *Ward v. Henry*, 15 Wis. 239; *Williams v. Brosnahan* (Mich.), 33 N. W. Rep. 739; *Gan-*

ong v. Green, *supra*; *Williams v. Dobson* (S. C.), 1 S. E. Rep. 421; *McFadden v. Hopkins*, 81 Ind. 459; *Slifer v. State* (Ind.), 16 N. E. Rep. 623.

An officer seizing the mortgaged property on execution is liable for the amount of the mortgage debt. *Wood v. Franks*, 56 Cal. 217. But in *Dakota Territory* it is held that if the officer leave property enough to satisfy the mortgage, the mortgagee can recover only the value of the property taken. *Keith v. Haggart*, 33 N. W. Rep. 465.

⁶ *Googins v. Gilmore*, 47 Me. 9; *Welch v. Whittemore*, 25 Me. 86; *Manning v. Monaghan*, 23 N. Y. 539; *S. C.* 10 Bosw. 231.

action for such damages; but a suit in trover may be amended and maintained by adding a count in case.¹

449 *a*. **Damages in actions by the mortgagor.**—In an action by the mortgagor against a third person for a conversion of the mortgaged property, the measure of damages is ordinarily the value of the property converted at the time of the conversion.² But if, after the bringing of the action, the mortgagee takes possession of the property for a breach of the condition, such taking is regarded as an application of the property for the benefit of the mortgagor, and should be considered by the jury in mitigation of damages, although the foreclosure was not complete at the time of the trial.³ The making of a second mortgage of the property, after the bringing of such action by the mortgagor, is not an abandonment of the cause of action, and does not affect the amount of damages recoverable, unless the mortgagee applies the property to the satisfaction of such mortgage.⁴

In an action by the mortgagor against the mortgagee for taking possession of the mortgaged property wrongfully and prematurely, the plaintiff can recover only the value of his interest or equity in the property, which is the value of the property less the amount of the liens upon it, together with damages for detention, which would be the reasonable value of the use of the property.⁵

450. **Equity will enjoin a threatened injury to the mortgagee's rights.** Equity will not permit the mortgagor to sell and place beyond the reach of the mortgagee chattels of which the latter has the legal title and the right of immediate possession. The mortgagor, or any one claiming under him, will be enjoined from disposing of or carrying away any of the mortgaged property.⁶ And especially after forfeiture, and after the mortgagee has filed a bill to obtain foreclosure and sale, the court will not

¹ *Ayer v. Bartlett*, 9 Pick. (Mass.) 156; *Forbes v. Parker*, 16 Ib. 462.

² *Cram v. Bailey*, 10 Gray (Mass.), 87.

³ *Ullman v. Barnard*, 7 Ib. 554, 558; *Dahill v. Booker*, 140 Mass. 308.

⁴ *Dahill v. Booker*, *supra*.

⁵ *Torp v. Gulseth* (Minn.), 33 N. W. Rep. 550; *Bearss v. Preston* (Mich.), 32 N. W. Rep. 912.

⁶ § 601; *Chapman v. Hunt*, 13 N. J. Eq. 370; *Downing v. Palmateer*, 1 Mon. (Ky.) 64; *Clagett v. Salmon*, 5 G. & J. (Md.) 314, 348; *Rose v. Bevan*, 10 Md. 466; *McCormick v. Hartley*, 107 Ind. 248; *Arnett v. Trimmer* (N. J.), 11 Atl. Rep. 487.

permit the mortgagor to sell the property, but will prevent a threatened sale by injunction.¹

Equity will protect the interest of the mortgagee in after-acquired property by restraining the mortgagor from disposing of it, especially if the threatened injury to the mortgagee's security would be irreparable.²

A mortgagee may have remedy by a proper proceeding in equity to prevent a loss of his security through proceedings in behalf of other creditors of the mortgagor.³ But inasmuch as the mortgagee after default has the absolute legal title to the property, it would seem that his legal remedy would be sufficient for his protection, and that a court of equity would decline to interfere by injunction."⁴

But where the property is in the possession of the mortgagor, the court will protect the mortgagee by enjoining a sale until the debt is paid, or a decree of foreclosure and sale is rendered. The necessity for such protection may arise in case the mortgage covers only an undivided interest in property, so that the mortgagee has no right of possession as against the other part owner.⁵

The mortgagee is not entitled to an injunction restraining a sale of the mortgaged property under execution by a creditor of the mortgagor, when the property was in the possession of the mortgagee when it was seized, provided the property be such that its value is ascertainable and measurable in money; for in such case the remedy at law is adequate.⁶

¹ Chapman v. Hunt, 13 N. J. Eq. 370.

² Story's Eq. Jur. § 710; Wood v. Rowcliffe, 3 Hare, 304, 309.

³ Curd v. Wunder, 5 Ohio St. 92; McCormick v. Hartley, 107 Ind. 248.

⁴ Adams v. Nebraska City Nat. Bank, 4 Neb. 370, 373.

⁵ Hall v. Bellows, 11 N. J. Eq. 333.

⁶ La Mothe v. Fink, 8 Biss. 493, 496; 12 Chicago N. L. 152; S. C. 9 Rep. 168.

Various cases were cited in argument, in which jurisdiction in equity was entertained to prevent the transfer of articles of personal property, or to compel their specific delivery. "All these were cases," said Judge Dyer, "where the chattels were articles of antiquity or curiosity, or were memorials of affection, or constituted in-

signia of office, and equitable interposition to preserve them to the owner *in specie* was sustained, on the ground that they were of peculiar character and value, and that the recovery of their intrinsic value in money would not be adequate satisfaction to the owner. There is another class of cases in which courts of equity have interposed to protect the owner of specific chattels in the beneficial enjoyment and use of them *in specie*; as where certain articles of property were placed in the hands of an agent to be held for the owner, and the agent has threatened to dispose of them to a third party in violation of his trust. The ground upon which equitable relief in such cases has been afforded is found to lie in the

451. A mortgagee, in case of apprehended danger of loss of the mortgaged property, may have a receiver appointed, even before his right to foreclose has accrued.¹ The power of a court of equity to preserve the mortgaged property from destruction, so that it may answer the purpose of the mortgage, is undoubted. A bill for an injunction and the appointment of a receiver may be sustained, where it is shown that these remedies are proper for the mortgagee's protection, although the time of payment set in the mortgage has not arrived.²

452. A mortgagee in possession may defend his title just as any absolute owner may defend. A mortgagee rightfully in possession of the mortgaged property cannot be deprived of it by the levy of an execution upon it, or the making of an attachment of it by a creditor of the mortgagor.³ Such mortgagee has a title which he may defend in the same manner that he may defend his title to any property of which he is the absolute owner. If an officer attempt to take the property upon an execution issued against the mortgagor, the execution not being a lien prior to the mortgage, the mortgagee is justified in forcibly resisting the officer.⁴ But if the officer succeeds in taking the property, the mort-

fiduciary relation which existed between the parties, together with the threatened mischief."

The learned judge further said: "The principle upon which jurisdiction may be invoked to grant relief by injunction or decree for specific delivery of personal property in the classes of cases mentioned is plainly not applicable to the case at bar; for here the case is simply that of seizure and threatened sale upon execution of ordinary personal property, the entire and actual value of which for all purposes is ascertainable and is wholly measurable by money, and which the alleged owner holds only for purposes of sale and conversion into money to satisfy a debt. . . .

"In an action at law for the alleged trespass or for conversion of the property, the measure of damages would be the value of the property when taken with interest from the time of the taking to

the time of the trial, and this would, under the facts as averred in the bill, cover all damages sustained. Moreover, in determining value, the complainant would not be restricted to amounts realized for the property by the marshal on execution sale. He would be at liberty to recover actual value, though the marshal might not have realized one half such value."

¹ *Rose v. Bevan*, 10 Md. 466; *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Maish v. Bird*, 59 Iowa, 307.

² *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93, 431.

³ *Pike v. Colvin*, 67 Ill. 227; *Prior v. White*, 12 Ill. 261; *Durfee v. Grinnell*, 69 Ill. 371; *Giffert v. Wilson*, 18 Bradw. (Ill.) 214; *Marsh v. Lawrence*, 4 Cow. (N. Y.) 461; *Moore v. Murdock*, 26 Cal. 514; *Volney Stamps v. Gilman*, 43 Miss. 456; *Troy v. Smith*, 33 Ala. 469.

⁴ *Wentworth v. People*, 4 Scam. (Ill) 550.

gagee may sue him for the conversion, and recover the value of the property,¹ or the value of his interest in the goods.²

453. A mortgagee of a chattel is entitled to the possession of it against a collector of taxes, who, after the mortgage, has distrained it for a tax due from the mortgagor.³ Taxes upon personal property constitute no lien. The collector cannot seize mortgaged property in disregard of the rights of the mortgagee.

II. *The Mortgagor's Right to sell the Property.*

454. Before forfeiture the mortgagor in possession may sell the mortgaged property, subject, of course, to the payment of the mortgage debt.⁴ The purchaser takes all the interest the mortgagor had.⁵ Such purchaser may again, before default, sell and deliver the property to another with like effect, and the remedy of the mortgagee upon maturity of the debt is to follow the property and recover it of the last purchaser.⁶ Although the mortgage empowers the mortgagee to take possession of the property at any time, in case he deems himself unsafe, the mortgagor has full authority to sell the property so long as there has been no default and no demand of possession under the safety clause. Until such time a sale by the mortgagor does not amount to a conversion on his part, nor does the purchase amount to a conversion on the part of the purchaser.⁷

But after forfeiture the mortgagor has no title to the mortgaged property and cannot make a legal sale of it. By the mortgage, the whole legal title passes conditionally to the mortgagee, whose title upon forfeiture becomes absolute at law, leaving no interest in the mortgagor save a right to redeem in equity.⁸ Actual possession by the mortgagee is not essential to support his title. If the mortgagor be allowed to remain in possession after default, he

¹ *Worthington v. Hanna*, 23 Mich. 530; *Nelson v. Wheelock*, 46 Ill. 25.

² *Becker v. Dunham*, 27 Minn. 32; *S. C.* 6 N. W. Rep. 406; *Bailey v. Godfrey*, 54 Ill. 507.

³ *Fuller v. Day*, 103 Mass. 481.

⁴ *Chapman v. Hunt*, 13 N. J. Eq. 370, per Green, Chancellor; *Mechanics' Building & Loan Association v. Conover*, 14 Ib. 219; *Cadwell v. Pray*, 41 Mich. 307; *Daly v. Proetz*, 20 Minn. 411; *Davis v. Blume*,

1 Mont. 463; *Heflin v. Slay*, 78 Ala. 180, 183; *McFadden v. Hopkins*, 81 Ind. 459.

⁵ *McLaughlin v. Smith*, 45 Mich. 277.

⁶ *Porter v. Parmly*, 34 N. Y. Superior Ct. 398; *S. C.* 43 How. Pr. 445; *Hathaway v. Brayman*, 42 N. Y. 322.

⁷ *Hathaway v. Brayman*, *supra*; *Heflin v. Slay*, *supra*.

⁸ *Chapman v. Hunt*, *supra*, per Green, Chancellor.

may transfer such possession together with his equity of redemption. That is all the interest he has in the property and is all he can transfer. The mortgagee may at any time take possession. It is his property, and he may do what he chooses with it.¹

A purchaser from the mortgagor obtains his rights, and no other or greater rights.² A purchaser from a subsequent mortgagee in like manner acquires his interest subject to the prior mortgage.³

455. Under a statutory provision that the mortgagor shall not sell or pledge the mortgaged property without the written consent of the mortgagee, a sale without such consent is so far valid that when consummated by delivery of the chattel and payment of the price, the title passes; but at the same time it is so far void that no action will lie to enforce a contract of sale; for the sale being prohibited, and a penalty affixed to the seller, the transaction, as to him, is void.⁴

A purchaser from a mortgagor, with notice of a stipulation by him not to sell or dispose of the property, becomes liable to the mortgagee for a wrongful conversion of the property.⁵

If the mortgagee has reserved the right to take possession of the mortgaged chattels if the mortgagor sells them, the right is optional with the mortgagee, and the mortgagor is not in fault for not delivering the goods if they are not demanded. The mortgagee cannot maintain replevin against him for the goods until he has made demand for them.⁶

456. A mortgagor may make an absolute sale of the mortgaged property with the mortgagee's oral consent.⁷ A manufacturer of boilers borrowed money from time to time to carry on his business, and gave to the lender a mortgage upon his stock and manufactured property. One of these mortgages included a boiler which the maker sold, received payment for, and by direction of

¹ *Porter v. Parmly*, 34 N. Y. Sup. Ct. 398.

² *Russell v. Fillmore*, 15 Vt. 130; *Hammond v. Plimpton*, 30 Vt. 333; *Arnold v. Stock*, 81 Ill. 407; *Black v. Robinson*, 61 Miss. 54.

³ *Hale v. Omaha Nat. Bank*, 39 N. Y. Superior Ct. 207.

⁴ *Gage v. Whittier*, 17 N. H. 312.

⁵ *Fisher v. Friedman*, 47 Iowa, 443.

⁶ *Cadwell v. Pray*, 41 Mich. 307.

⁷ *Pratt v. Maynard*, 116 Mass. 388; *Stafford v. Whitcomb*, 8 Allen (Mass.), 518; *Gage v. Whittier*, *supra*; *Patrick v. Meserve*, 18 N. H. 300; *Brandt v. Daniels*, 45 Ill. 453; *Perry v. Dow*, 56 Vt. 569; *Littlejohn v. Pearson* (Neb.), 36 N. W. Rep. 477.

the purchaser placed it on a lot of land near the maker's shop. The purchaser had dealt with the manufacturer for three years, buying stock and materials included in the mortgages, and sometimes paid him and sometimes by his order had paid directly to the mortgagee, who had a general knowledge of this course of dealing and acquiesced in it. From these facts it was proper to infer that the mortgagee gave the manufacturer general authority to sell the mortgaged property, and evidence that the mortgagee did not know of the sale of this specific boiler, or of the delivery of it to the purchaser, was immaterial.¹

Although a sale of the mortgaged property by the mortgagor without the consent in writing of the mortgagee be prohibited by statute, if the mortgagee consent verbally to a sale, such sale is sufficient to pass the title to the purchaser in possession, and the mortgagee cannot maintain trover for the property.²

A mortgagee who has given the mortgagor in possession license to sell or exchange the property is estopped to claim the property from one who has purchased without knowledge of the mortgage, or has exchanged other property for the mortgaged chattels.³ But if such third person surrender the mortgaged property upon the mortgagee's demand, he cannot replevy from the mortgagor the chattels given the latter in exchange for the mortgaged chattels.⁴

Where a mortgagee who has consented to a sale of the mortgaged chattels, and guaranteed to the purchaser that the mortgage should never be used against him, assigns the mortgage to one who enforces it against the property, the mortgagee is liable to the purchaser for the damages he has been subjected to by reason of the assignment.⁵

457. Authority in the mortgagor to sell the mortgaged property may be inferred. Such authority depends upon the intent of the parties. This intent is a question of fact for the jury; and the court should not instruct the jury that if they find the circumstances from which such intent might be inferred, they are bound, in the absence of contradictory testimony, to find the au-

¹ *Pratt v. Maynard*, 116 Mass. 388.

² *Gage v. Whittier*, 17 N. H. 312.

³ *Carter v. Fately*, 67 Ind. 427; *Bangs v. Friezen* (Minn.), 32 N. W. Rep. 173.

⁴ *Carter v. Fately*, *supra*.

⁵ *Lain v. Simon*, 19 S. C. 270.

thority and intent.¹ The mortgagor's authority to sell may be implied from his covenant to account to the mortgagee for the proceeds of sales.² His authority to sell may also be implied from the general course of dealing of the parties. Thus, where one had been in the habit for some years of buying stock and materials of a boiler-maker, and sometimes making payment to him and sometimes to a mortgagee of the property, the latter having a general knowledge of the course of dealing and acquiescing in it, it was held on the trial of the issue whether the purchaser or the mortgagor had the better title to a boiler purchased and paid for to the mortgagor, that the jury would be warranted in finding that the mortgagee had given the mortgagor a general authority to sell the mortgaged property, and that evidence that the mortgagee did not know of the sale of the boiler or of the delivery of it to the purchaser was immaterial.³ If a manufacturer of woollen cloth mortgages his stock of wool or some portion of it, and the mortgagee allows him to carry on his business as before, and to manufacture the wool into cloth, and to deal with this as his own, the mortgagee cannot afterwards set up title to the cloth against a subsequent purchaser in good faith.⁴

A mortgagee who accepts the proceeds or the benefits of sales made by the mortgagor, cannot question their validity. Under a mortgage of crops which authorizes and directs the mortgagor to gather and prepare the crops for market, and the mortgagor, in order to obtain money for this purpose, sells cotton included in the mortgage, the mortgagee, having received the benefit of the mortgagor's act in selling the cotton, cannot maintain an action against the purchaser for the conversion of such cotton.⁵

458. One who purchases of the mortgagor property covered by a mortgage which authorizes him to sell in the ordinary course of business acquires a good title to it. This is so whether the power to sell be express or only implied; and if there be such a power, it does not matter that the mortgage contains a covenant by the mortgagor not to dispose of any of the goods without the consent in writing of the mortgagee. This proposition is supported by a recent decision in England by the Court

¹ *Jenckes v. Goffe*, 1 R. I. 511.

² *Abbott v. Goodwin*, 20 Me. 408.

³ *Pratt v. Maynard*, 116 Mass. 388.

⁴ *Thompson v. Blanchard*, 4 N. Y. 303.

⁵ *Etheridge v. Hilliard* (N. C.), 6 S. E. Rep. 571.

of Common Pleas.¹ The grantee in a bill of sale given by way of mortgage sought to recover in an action of detinue possession of a cob or pony included in the bill of sale. It appeared that the mortgagor was described as an innkeeper and horse-dealer, and the bill of sale contained an assignment of all and every the household goods and furniture, stock in trade, etc., also one entire horse, called "Fireaway," horse called "Jimmy," cob called "Charley," and pony called "Nelly," light gig, dog-cart, etc., and all goods, chattels, and effects now on the said messuage, and all other the book and other debts and sums of money due and owing to the said grantor, and all other his personal estate. The bill of sale was given as a security for a loan of money, and the object of the security, the court declared, was not to paralyze the trade of the grantor, but to enable him to carry on his trade, and the security would be worthless if it were to be construed so as to paralyze his trade.

In another case, a bill of sale by way of mortgage was made of the growing crops, goods and chattels, and effects, which were, or thereafter should be, on a certain farm. In a suit by the mortgagee against a third person for a conversion of twelve quarters of wheat comprised in the bill of sale, the defence was that the plaintiff suffered the mortgagor to have possession, and enabled him to hold himself forth as having the property in the wheat;

¹ Walker v. Clay, 42 Law Times N. S. 369, for May 15, 1880; S. C. 49 L. J. R. 660. "The covenant by the grantor not to remove any of the things comprised in the bill of sale, without the consent of the grantee," said Lindley, J., "is not a covenant not to sell at all; for that, to my mind, would be contrary to the intention of the parties, and would destroy the value of the security. The covenant not to remove the chattels must be construed and regarded as a covenant not to remove or dispose of them otherwise than in the ordinary course of trade. Then there is a covenant, 'it shall be lawful for the said mortgagor, his executors and administrators, to hold, make use of, and possess the said premises hereby assigned or intended so to be, without any hindrance or disturbance of or by the said mortgagee, his executors, administrators, or assigns,

provided that the total principal moneys shall not exceed 300l.' Taking all these provisions together, the conclusion is arrived at that the grantor is to carry on his business in the ordinary course of trade; but if he is desirous of disposing of anything in any other sense, then he is not to do so without consulting the grantee, and obtaining his consent, — as if, for instance, he required to move the goods into another house. Here, then, is the case of a horse-dealer who sends a horse for sale in the ordinary course of his business, and a *bonâ fide* purchaser for value without notice; and the question is, whether he has obtained a good title as against the mortgagee. It appears to me that this case is quite undistinguishable from the case of the National Mercantile Bank v. Hampson, 5 Q. B. D. 177; S. C. 49 Law J. Rep. Q. B. D. 480.

and that the defendant bought it of him in the ordinary course of his business, and without notice that it did not belong to the mortgagor. The Court of Queen's Bench held this defence to be good.¹ "The bill of sale clearly did not disentitle the grantor to sell in the ordinary course of his business. There is an implied license to a trader, who gives a bill of this kind, to carry on his trade."

The grantee of the bill of sale might be estopped from disputing the tradesman's right to give title, if there were evidence that the latter had made many sales, and the holder of the bill had not interfered. The right of a trader to deal with such ought to be secured in the Bills of Sale Act, says Mr. Justice Lindley.

459. But a trader can sell only in the ordinary course of trade by virtue of an implied license in a bill of sale he has given of his stock in trade to secure money borrowed, arising from a power reserved to hold and use the goods without hindrance by the grantee until default; and where, therefore, he sells fraudulently, and not in the ordinary course of trade, the purchaser acquires no title to the goods as against the mortgagee, though he purchased *bonâ fide* and without notice of the fraud. A purchaser bought of one who had no right to sell, for he did not sell in the only way in which he could by law give a title.² "It has been suggested," said Lord Coleridge, C. J., delivering the opinion, "that this was a case in which there are two innocent parties, and that the one, namely, the grantee of the bill of sale who enabled the fraud to be committed, must, therefore, bear the loss. But that doctrine does not apply to this case, in which the property was taken out of the person who professed to sell, and was vested in another by a bill of sale, an instrument known to law and recognized by parliament."

Where the rule prevails that a power in the mortgagor to sell the mortgaged property makes the mortgage conclusively fraudulent, it is held, that if the mortgagee knowingly permit the mortgagor to make sales in the ordinary course of business, he will be considered, in a contest with a purchaser of the remainder of the

¹ National Mercantile Bank v. Hampson, 5 Q. B. D. 177. S. C. 49 L. J. R. 563; Payne v. Fern, 6 Q. B. D. 620.

² Taylor v. M'Keand, 5 C. P. D. 358;

property, to have consented by implication to such sale, and he therefore cannot object to it.¹

An agreement that a mortgagor may retain possession of a stock of goods and make sales in the usual course of trade, other goods of equal value being substituted for those sold, does not authorize the mortgagor to put the mortgaged property into a partnership as his share of the capital. Such a disposal of the property is not a sale in the ordinary course of business.²

460. An absolute sale of the mortgaged property by the mortgagor or any one claiming under him, in exclusion of the rights of the mortgagee, is a conversion of it for which the mortgagee may maintain trover.³ This is upon the general principle that assuming to one's self the property and right of disposing of another's goods is a conversion. Upon this principle, also, a mortgagor in possession, who again mortgages the entire property without giving notice of the existing mortgage, and afterwards gives the second mortgagee possession, or permits him to take possession, is guilty of a conversion, and is liable to the first mortgagee in an action of trover.⁴ After such a sale the mortgagee may take immediate possession, although the mortgage in terms provides that the mortgagor may retain possession until maturity of the debt secured.⁵ If a mortgagor, for the purpose of defrauding the mortgagee, sends the mortgaged goods to an auctioneer, by whom they are sold, and the proceeds paid over to the mortgagor, the mortgagee may maintain trover for the goods against the auctioneer, although the latter did not participate in the fraud, and had no knowledge of the existence of the mortgage.⁶ In such action the plaintiff need not show that the mortgagor is wholly irresponsible.⁷

An absolute sale of the mortgaged property by the mortgagor's assignee for the benefit of creditors is a conversion, and he is

¹ *Ogden v. Stewart*, 29 Ill. 122; *Bar-net v. Fergus*, 51 Ill. 352, 355.

² *Barnard v. Eaton*, 2 Cush. (Mass.) 294.

³ *Whitney v. Lowell*, 33 Me. 318; *White v. Phelps*, 12 N. H. 382; *Ashmead v. Kellogg*, 23 Conn. 70; *Coles v. Clark*, 3 Cush. (Mass.) 399; *Chamberlain v. Clemence*, 8 Gray (Mass.), 389; *Spriggs v. Camp*, 2

Speers (S. C.), 181; *Bellune v. Wallace*, 2 Rich. (S. C.) 80; *Heflin v. Slay*, 78 Ala. 180, 183; *Lowe v. Wing*, 56 Wis. 31.

⁴ *Millar v. Allen*, 10 R. I. 49.

⁵ *Whitney v. Lowell*, *supra*.

⁶ *Coles v. Clark*, 3 Cush. (Mass.) 399; *Moloughney v. Hegeman*, 9 Abb. (N. Y.) N. C. 403.

⁷ *Moloughney v. Hegeman*, *supra*.

liable to an action of trover by the mortgagee.¹ In such suit the mortgagee need not allege and prove the amount due under the mortgage, and the destruction of the security, but only his special ownership under the mortgage, and that the assignee has wrongfully converted the mortgaged property.² The mortgagee may also obtain the protection of a court of equity to restrain a sale of the goods by the assignee.³

And so if the mortgaged property be sold on execution issued against the mortgagor, the mortgagee may maintain an action for damages against the purchaser before the condition of the mortgage has been broken.⁴ Only the mortgagor's interest in the property can be levied upon or sold by the mortgagor's creditor. After condition broken, the mortgagee may demand possession of the property from the officer, and upon his refusal to surrender it he may maintain an action of replevin for the property, though the mortgagee has never demanded of the mortgagor that he should fulfil his contract.⁵

461. The mere fact that the mortgaged property was sold by a junior mortgagee for its full value, in the exercise of his legal right to foreclose his mortgage and sell his interest in the property, is not sufficient to make such sale hostile to the rights of a prior mortgagee; especially if it appear that the property was not sold in parcels and was not scattered or dissipated. Such a sale is not inconsistent with the right of the prior mortgagee to enforce his lien, although it may indicate that the purchaser intends to contest it. That an action could in any case be maintained by a prior mortgagee against a subsequent mortgagee, upon the ground that the latter so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the

¹ Case-Threshing Machine Co. v. Campbell (Oreg.), 13 Pac. Rep. 324; Arnett v. Trimmer (N. J.), 11 Atl. Rep. 487.

² Case v. Threshing Machine Co. *supra*.

³ Arnett v. Trimmer, *supra*.

⁴ Levi v. Legg, 23 S. C. 282; Bigelow v. Casper (Mass.), 13 N. E. Rep. 896; Williams v. Dobson (S. C.), 1 S. E. Rep. 421.

The mortgagee may not only sue the mortgagor who has wrongfully sold the property, but the purchaser. Where a con-

stable seized a horse under a chattel mortgage, but the mortgagor recovered it in replevin and sold it, it was held that the mortgagee could maintain trover against the purchaser, and that he was not concluded by a judgment against the constable, even though the latter was his agent, and had acted as his attorney in the replevin suit. Warner v. Comstock, 55 M ch. 615.

⁵ Ament v. Greer (Kans.), 16 Pac. Rep. 102.

value of the lien of the former, is a question that seems not to have been directly affirmed by any decision, though several judges have intimated that this might be done.¹

462. A mortgagor in possession is guilty of a tortious conversion, if he again mortgages the entire property without giving notice of the existing mortgage, and afterwards gives the second mortgagee possession, or permits him to take possession.² A mortgagor in possession is a bailee for the mortgagee, who is the legal owner, with the right to take possession at any time, unless he has otherwise stipulated. He is not a mere bailee because he has an interest in the property; he has an equity of redemption. This he may sell or mortgage; but he cannot go further and sell or mortgage the entire property, and thus deal with that which belongs to another as if it were his own.³

463. A mortgagor remaining in possession after default by permission of the mortgagee, who has the legal title and right of possession of mortgaged chattels, is authorized to commit the temporary custody of them to a teamster to remove them from one house to another, although the mortgage provides that the chattels shall not be removed without the consent of the mortgagee, and such consent be not given; and the teamster is not guilty of conversion for so removing them, although forbidden to do so by the mortgagee. The teamster having no intention to convert the property to his own use, or to the use of the mortgagor, but only to transport them from one house to another, there is no assumption of ownership, or of a right to dispose of another's goods, by wrongfully taking, illegally using, or wrongfully detaining them, such as is an essential ingredient of a conversion.⁴

464. A mortgagee cannot pursue the proceeds of a sale of the mortgaged property made by the mortgagor, and received and applied by a bank or other third party in good faith in payment of an antecedent indebtedness. The party receiving the

¹ *Hale v. Omaha Nat. Bank*, 64 N. Y. 550; *S. C.* 7 J. & S. 207. *v. Kellogg*, 23 Conn. 70; *Coles v. Clark*, 3 Cush. (Mass.) 399.

² *Millar v. Allen*, 10 R. I. 49; *Ashmead* ³ *Millar v. Allen*, *supra*, per *Durfee, J.*

⁴ *Metcalf v. McLaughlin*, 122 Mass. 84.

proceeds of such property has a right to presume that the sale was proper; or, if not, that the mortgagee will pursue the property itself, and not its proceeds. If the fact of the existence of a mortgage were known to the party receiving the proceeds of such property, and the identical proceeds could be traced, a different question might arise.¹

465. A mortgagee waives his lien by consenting to a sale of the mortgaged property by the mortgagor, and receiving a portion of his pay from the purchaser as a consideration for his agreement, upon an understanding that he would look to the mortgagor for the balance due on the mortgage. He will not afterwards be permitted to turn round and enforce the mortgage against the purchaser.² Such consent need not be in writing, or if it be in writing it need not be indorsed upon the mortgage or entered upon the record of it.³ In an action of trover by a mortgagee for the mortgaged chattel, the defendant may show that he bought it of the mortgagor, and that the mortgagee assented by parol to the sale;⁴ or that he assented to an exchange of the mortgaged property for other property.⁵ If the mortgagee's consent to the sale be shown, the purchaser obtains a good title, and it is immaterial that at the time of the purchase he did not know of the existence of the mortgage.⁶

A second mortgagee, by consenting to a sale of the property by the mortgagor discharged of his mortgage, does not estop himself from setting up against the purchaser a title subsequently acquired by assignment of the first mortgage.⁷

If the mortgagee consent to a sale of a portion of the mortgaged property to one who undertakes to pay a part of the mortgage debt, with the understanding that the mortgage lien shall continue in the mean time, and such purchaser sells to one who has no knowledge of their agreement or of the mortgage, the mortgagee may follow the property into the hands of the last purchaser.⁸

¹ *Burnett v. Gustafson*, 54 Iowa, 86; S. C. 6 N. W. Rep. 132.

² *Rider v. Powell*, 4 Abb. (N. Y.) App. Dec. 63.

³ *Roberts v. Crawford*, 54 N. H. 532; *Pratt v. Maynard*, 116 Mass. 388; *Stafford v. Whitcomb*, 8 Allen (Mass.), 518; *Flenniken v. Scruggs*, 15 S. C. 88.

⁴ *Gage v. Whittier*, 17 N. H. 312.

⁵ *Flenniken v. Scruggs*, *supra*.

⁶ *Stafford v. Whitcomb*, *supra*; *Flenniken v. Scruggs*, *supra*.

⁷ *Clark v. Hale*, 8 Gray (Mass.), 187.

⁸ *Oswald v. Hayes*, 42 Iowa, 104.

A sale of a chattel by the mortgagee with the consent of the mortgagor vests a good title in the purchaser.¹

A mortgagee may waive his lien under the mortgage without prejudice to his right of action to recover the debt secured.²

466. A mortgagee waives his mortgage by being present at a sale of the property by the mortgagor without making known his lien upon it. In a case where the mortgagee was present at such a sale, and at request of both mortgagor and purchaser fixed the price between them, and the property was delivered to the purchaser, the mortgagee was held to be estopped to claim the property of the purchaser.³

Where a mortgagee of personal property consents to its sale by the mortgagor, and the purchaser takes possession agreeing with the mortgagee to pay the mortgage debt within a specified time, and such purchaser continuing in possession executes a mortgage to another who has no actual notice of the former mortgage, the latter will not be bound to notice the former mortgage, which as to him the former mortgagee will be deemed to have waived.⁴

The doctrine that a mortgagee waives his mortgage by standing by and allowing the mortgagor to sell the property as his own, applies also when a mortgagee allows the mortgagor to assume the credit of ownership, and is not actually present when the sale is made.⁵

But a mere declaration by a mortgagee, on learning that the mortgagor had sold the mortgaged property, that he cared nothing about the property and did not want it, does not preclude him from afterwards asserting his title under the mortgage.⁶ Nor does a mortgagee, by his silence on being informed that a portion of the property has been disposed of by the mortgagor, release the property from his lien;⁷ though his assent to such disposition of the property would have that effect.

467. A mortgagee may by agreement waive his mortgage in favor of another creditor, but he cannot use his mortgage to protect another creditor against a subsequent mortgagee, unless

¹ Patrick v. Meserve, 18 N. H. 300.

² Jones v. Turck, 33 Iowa, 246.

³ See Brooks v. Record, 47 Ill. 30.

⁴ Brandt v. Daniels, 45 Ill. 453.

⁵ Thompson v. Blanchard, 4 N. Y. 303.

⁶ White v. Phelps, 12 N. H. 382.

⁷ Patterson v. Taylor, 15 Fla. 336.

the mortgage in express terms covers the claim of such other creditor. Such agreement may be verbal only,¹ or written.²

468. A mortgagee does not waive his lien by taking possession of the mortgaged property under a distress warrant for rent. He is regarded as holding possession both as landlord and mortgagee; and as against third parties subsequently acquiring rights in the property, he may subject it to the payment of either or both liens.³

469. Of course a mortgagee may purchase the equity of redemption of the mortgaged chattels; but equity looks with a jealous eye upon sales of the equity of redemption to the mortgagee, and requires them to be established by the clearest and most convincing proof.⁴ Such a sale must be a fair one. If the mortgagee uses the power his mortgage gives him over the mortgagor, to obtain the equity of redemption at less than its value, and for a less price than others would have given for it, a court of equity will hold the transaction to be still a mortgage, and will permit the mortgagor to redeem.⁵ And so if a mortgagee by absolute bill of sale falsely represents to the administrator of the mortgagor that there was no right of redemption, and induces such administrator to accept an alleged balance of purchase money, and the latter thereupon surrenders the property, the equity of redemption is not cut off.⁶

A court of equity will, however, relieve against a sale made for a grossly inadequate price.⁷

470. A mortgagee extinguishes his mortgage by buying the property at a sale under execution at the suit of a third person, subject to his own mortgage. He cannot afterwards maintain an action on the debt against the mortgagor; and his title as mortgagee is merged with his title as general owner.⁸

471. Mortgaged property is subject to forfeiture under the

¹ *Hunt v. Daniels*, 15 Iowa, 142.

² *Poland v. Lamoille Valley R. R. Co.* 52 Vt. 144; *S. C.* 14 Am. Law Rev. 539.

³ *Atkins v. Byrnes*, 71 Ill. 326. See, however, § 565.

⁴ *Locke v. Palmer*, 26 Ala. 114; *Hackleman v. Goodman*, 15 Ind. 202.

⁵ *Goodman v. Pledger*, 14 Ala. 114.

⁶ *Phillips v. Hunter*, 22 Mo. 485.

⁷ *McKinstry v. Conly*, 12 Ala. 678.

⁸ *Merritt v. Niles*, 25 Ill. 282.

revenue laws of the United States for the act of the mortgagor, although the mortgagee did not participate in such act.¹ It is true that it has been held that the interest of a qualified owner, to the extent of his interest in the *res*, may be protected by the court having custody of the *res*, by directing payment of the lien out of the proceeds of the property condemned.² But if only the interest of the mortgagor be forfeited, how can anything more than his interest be sold; or if the court decrees a forfeiture of the *res*, and sells it as forfeited to the government, under what provision of law is the court authorized to pay the proceeds of sale to other parties than the government? It is clear that the court has no power to exempt a portion of the proceeds of the sale from the effect of the condemnation. The remedy of the mortgagee is to apply to the secretary of the treasury for a remission of the forfeiture, as respects his demand.³

III. *The Mortgagor's Power to create Liens upon the Mortgaged Property.*

472. A mortgagor in possession has no power to create by contract a lien that shall have priority of a duly recorded mortgage. Thus, a mortgagor being in possession of four horses, which were the subject of a mortgage duly filed, contracted with a farmer for the keeping of them through the winter; and in the spring took away three of the horses, leaving one in pledge for the sum due for the keeping of all the horses; and the pledgee refused to deliver this horse to the mortgagee upon his demand until his charges should be paid. The court decided that the mortgage had priority of the pledge or lien subsequently created by the mortgagor's contract.⁴ The law, in the absence of any special

¹ United States v. 7 Barrels of Distilled Oil, 6 Blatchf. 174.

² United States v. 396 Barrels of Distilled Spirits, 3 Int. Rev. Rec. 114, 123.

³ United States v. 7 Barrels of Distilled Oil, *supra*, per Benedict, J.

⁴ Bissell v. Pearce, 28 N. Y. 252; also Jackson v. Kasseall, 30 Hun (N. Y.), 231; Charles v. Neigelsen, 15 Bradw. (Ill.) 17; Reynolds v. Case, 60 Mich. 76; State Bank v. Lowe, 22 Neb. 88; 33 N. W. Rep. 482; Jones on Liens, § 691.

One holding a mortgage upon a horse

placed the horse in the hands of an agent with directions to foreclose the mortgage, and the agent kept the horse in his own stable. The debtor tendered the amount of the mortgage debt to the mortgagee, who accepted the tender, and ordered his agent to deliver up the horse, and to do nothing further in foreclosing the mortgage. The agent, however, claimed a lien for keeping the horse. It was held that he had no lien. Hale v. Wigton, 20 Neb. 83. Maxwell, C. J., dissented on the ground that the mortgagee had the legal

agreement, gave the farmer no lien upon the horses for the price of keeping them.

And so an agreement in a lease that certain personal property upon leased premises should not be removed while any of the rent should be in arrears, but should be security for it, cannot prevail against either a prior or subsequent mortgage of such property. The agreement creates only a lien in equity for the security of the rent.¹

A mortgagor cannot create a lien upon the property which shall take precedence of his duly recorded mortgage. Thus, a mortgagor of horses cannot subject them to a lien for their keeping without the acquiescence, express or implied, of the mortgagee.²

Mere knowledge on the part of the mortgagee that the horses are kept in a barn belonging to a third person, or to an employee of the mortgagor, is not sufficient to create an implied consent on the part of the mortgagee to such keeping.³

A mortgagee holding under a recorded mortgage is not liable for charges for the storage of the mortgaged property incurred by the mortgagor in possession, although the storage was necessary

title, subject only to the performance of the condition, and as such could contract with his agent for the care of the property as well as for the foreclosure of the mortgage.

¹ *Smith v. Worman*, 19 Ohio St. 145; *Lampshire v. Lowe*, 3 Neb. 131.

² *Sargent v. Usher*, 55 N. H. 287.

³ *Howes v. Newcomb* (Mass.), 15 N. E. Rep. 123. Knowlton, J., said: "Undoubtedly an implied consent will answer the requirements of the law, and in every case of this kind the inquiry is whether such implied consent is found. That depends, where animals are left with a mortgagor by a mortgagee, not only upon the terms of the express contract relating to them, but also upon all the circumstances surrounding the transaction indicating the expectation of the mortgagee as to the management of them by the mortgagor. If from these the mortgagee may be presumed to have understood that the mortgagor would take them to a stable-keeper to be boarded, and no objection was made,

such consent should be implied; otherwise it should not. It should be kept in mind that the purpose of a mortgage is to furnish security, and that the property is usually left with the mortgagor for his convenience, with an understanding that nothing shall be done or permitted by him to impair the security. An agreement which will defeat the purpose of the transaction should not be inferred or implied against a mortgagee without cogent evidence. A mortgage of horses, given to secure performance of an act in the distant future, is worthless if the mortgagor may create a lien upon them by putting them out to be boarded. It is true the mortgagee must know they are to be fed, and that it will cost something to feed them; but that in itself is immaterial. The real question is whether he has reason to believe, and does believe, that they are to be boarded at a livery stable, or kept by any one else than the mortgagor." See, also, *Storms v. Smith*, 137 Mass. 201.

for the preservation of the property, and the mortgagee was informed of the storing of the property, and expressed no disapproval.¹

473. The mortgagor's authority for the creation of a lien upon the property may be implied. Thus, where the subject of a mortgage was a hack let for hire, and it was described as "now in use" at certain stables, and it was stipulated that the mortgagor might retain possession and use it, it was regarded as the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means of earning wherewithal to pay off the mortgage debt.²

But where one manufacturing engines for certain boats under contract mortgaged them when they were only partly built, and afterwards proceeded with their construction under a verbal agreement with the mortgagee that he might go on with the work and finish the engines, it was held that this agreement did not give him a lien as against the mortgagee for the work thereafter done upon the engines, nor authorize him to employ any one else to work thereon in such a manner as to create a lien for such work.³

474. But a lien given upon property by force of law, without any contract to create it, may have precedence of an existing mortgage. Thus, the lien of a shipwright upon a boat in his possession, for repairs necessary for its preservation made upon it, may be enforced as against a prior mortgage duly filed or recorded.⁴

¹ *Storms v. Smith*, 137 Mass. 201.

² *Hammond v. Danielson*, 126 Mass. 294.

³ *Globe Works v. Wright*, 106 Mass. 207. See §§ 535, 536.

⁴ *Beall v. White*, 94 U. S. 382; *Scott v. Delahunt*, 5 Lans. (N. Y.) 372. In the latter case the court also declared that the mortgagees were estopped from denying the validity of the lien, for they knew that the repairs were being made at the request of the mortgagor, who was the apparent owner, and gave no notice of their rights or claims. They stood by and saw valu-

able repairs and improvements made upon the property, without objection or notice that they did not intend to have the property subjected to the lien for repairs; and their silence would operate as a fraud upon the shipwright if they should now be permitted to assert their title by virtue of the mortgage to destroy the lien.

In a case of a shipwright's lien before the English Court of Common Pleas, the chief justice said: "There is, it seems, no authority to be found bearing upon the question, though I presume it must have arisen many times. I should rather ex-

A lien given by law for necessary repairs upon a boat takes precedence of an existing mortgage.¹ A lien for repairs upon a vessel under mortgage and in possession of the mortgagor may be enforced after the possession has been transferred to the mortgagee.² And this is true, notwithstanding the possession has been given him by a decree of a court in a suit for possession.³

But a landlord's lien for rent is subordinate to a mortgage executed before the rent accrued.⁴

Some authorities, contrary to the general rule, hold that an agistor's lien for keeping cattle is paramount to a prior mortgage thereon.⁵

Where taxes are not a lien upon personal property until a distraint is made, a mortgagee who takes possession under his mortgage and sells before a distraint is made, is entitled to the proceeds as against the taxes assessed against the mortgagor.⁶

475. Priority of statutory liens upon crops.—In Mississippi the act⁷ giving a "first lien in law" on crops to secure the wages of laborers creates a lien in their favor paramount to mortgages of such crops executed by the landowner to enable him to make the crops. "The policy of the statute is to make sure to the laborer his wages. That is accomplished by impressing on the entire agricultural crop a privilege to be paid in preference to

pect that it had never been made the subject of litigation because the right of lien has always been admitted to attach. I put my decision on the ground that the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose. The case states that the vessel had been condemned as unseaworthy by the government surveyor, and so was in a condition to be utterly unable to earn freight or be an available security or any source of profit at all. Under these circumstances, the mortgagor did that which was obviously for the advantage of all parties interested: he put her into the hands of the defend-

ant to be repaired; and, according to all ordinary usage, the defendant ought to have a right of lien on the ship, so that those who are interested in the ship, and who will be benefited by the repairs, should not be allowed to take her out of his hands without paying for them." *Williams v. Allsup*, 10 C. B. (N. S.) 417; and see *The Scio*, L. R. 1 Adm. & Eccl. 353, 355; *The St. Joseph*, 1 Brown Adm. 202.

¹ *Provost v. Wilcox*, 17 Ohio, 359.

² *Donnell v. The Starlight*, 103 Mass. 227.

³ *The Granite State*, 1 Sprague, 277.

⁴ *Hempstead, &c., Asso. v. Cochran*, 60 Tex. 620; *Rand v. Barrett*, 66 Iowa, 731.

⁵ *Case v. Allen*, 21 Kans. 21. Jones on Liens, § 692.

⁶ *Maish v. Bird*, 22 Fed. Rep. 180.

⁷ April 5, 1872.

other creditors or incumbrances." The laborer may, however, waive his lien in favor of his employer's mortgagee. This waiver may be made by parol; and the question whether the laborer has waived his lien in this way is one of fact for the jury. If one purchase from a laborer a crop which he is supposed to have secured by his labor, the purchaser takes only such right in the property as the laborer had; and if the laborer has waived his lien, the purchaser cannot shield himself on the plea that he was an innocent purchaser¹ without notice of such waiver. He is bound at his peril to inform himself of the terms of the laborer's contract. And so in the District of Columbia a statutory lien of a landlord for rent has priority of a mortgage of after-acquired property placed upon the premises by the tenant. Such a lien attaches whenever such property is acquired without the taking of possession, although it is displaced as regards chattels sold by the tenant in the ordinary course of trade and removed from the premises, and the purchaser taking them without knowledge of the lien acquires a perfect title.²

476. An instrument which is defective as a statutory lien for advances may be operative as a mortgage. Thus in Alabama, where a statutory lien for advances to make a crop is limited to debts for specific articles which are essential to the making of the crop, an instrument which does not contain the statements essential to create the lien may be held to operate as a mortgage as between the parties; and if recorded as a mortgage it would be effectual as against third parties.³

477. In the absence of a statute, a landlord has by virtue of his ownership no lien upon the crops raised by his tenant; therefore a mortgagee of the tenant's crop may maintain trover against a landlord who has taken possession of the crop and applied it to his rent account.⁴ It is immaterial that the mortgagee knew that the chattels were being used upon the leased premises.⁵

A landlord who has a lien by statute does not lose this by tak-

¹ *Buck v. Payne*, 52 Miss. 271.

³ *Tison v. People's Sav. & Loan Ass.*

² *Beall v. White*, 94 U. S. 382. The controversy related to a lease and mortgage of the furniture of a hotel, which

57 Ala. 323.

⁴ *Robinson v. Kruse*, 29 Ark. 575.

⁵ *Jarchow v. Pickens*, 51 Iowa, 381.

ing a mortgage and omitting to record it. The mere fact that the landlord did not record his mortgage, and thereby put it in a condition to create an available lien, is very strong proof that he relied upon, and did not waive, his landlord's lien.¹

478. Improvements and repairs upon the mortgaged property made by a mortgagor in possession are at his own cost and expense. But if a mortgagee expressly promises to pay a mechanic for repairs made upon the mortgaged property for the mortgagor, in consideration of which the mechanic relinquishes his lien, he is liable upon his promise though it be not in writing. The promise is not within the statute of frauds and may be enforced.²

479. The title of a mortgagee is unaffected by a vendor's lien for purchase money of which he had no notice either actual or constructive.³

480. Neither the mortgagor nor any one acquiring his title is allowed to defeat the mortgagee's title to the mortgaged property by setting up ownership in another. A mortgagor having the possession and the apparent ownership of personal property confers them upon his mortgagee, who may maintain his right against every one except the real owner, in case the mortgagor is not the real owner. Neither can a purchaser, who relies solely upon the title he acquired from the mortgagor, set up the title of a third person under whom he does not claim.⁴

IV. *Confusion of Mortgaged Goods.*

481. If a mortgagor so confuses the mortgaged goods with his own that they cannot be distinguished, and refuses to separate them, the mortgagee may take all such goods without becoming a trespasser.⁵ He will not be compelled to suffer from the wrongful act of the mortgagor.⁶ If he can distinguish the mortgaged goods

¹ Pitkin v. Fletcher, 47 Iowa, 53. It was contended in this case that the chattel mortgage was void because it was not recorded, and that the taking of the mortgage was a waiver of the lien. The court declared the position was not sound; that none of the authorities hold that a lien is waived or lost by taking security not enforceable against third persons.

² Conradt v. Sullivan, 45 Ind. 180.

³ Manny v. Woods, 33 Iowa, 265.

⁴ Adams v. Wildes, 107 Mass. 123; Thompson v. Spittle, 102 Mass. 207.

⁵ Fuller v. Paige, 26 Ill. 358; Burns v. Campbell, 71 Ala. 271.

⁶ Merchants' Nat. Bank v. M'Laughlin, 1 McCrary, 258; S. C. 2 Fed. Rep. 128; Simmons v. Jenkins, 76 Ill. 479.

from the goods with which they have been commingled, he is bound to do so.¹ Whether a mortgagor has purposely or carelessly mingled other goods with his own so that they are not distinguishable, the result is the same. If he sells the whole, the mortgagee may replevy the whole from the purchaser, upon the failure of the latter to identify the specific articles not embraced in the mortgage.² If the mortgagor consign such goods to a third person for sale, the mortgagee is entitled to recover of the consignee the value of the whole when sold.³

And so if a purchaser of mortgaged goods mixes his own goods with them and refuses to separate them, the mortgagee may take all the goods without being a trespasser.⁴

The foundation of the doctrine of confusion of goods is the affording of protection to innocent owners. The loss and inconvenience arising from such confusion is therefore thrown upon the party who causes the confusion, and it is for him to distinguish and separate his own property or to lose it.⁵

482. When new goods have been added to a mortgaged stock, it is the duty of the mortgagor to identify the latter upon the mortgagee's taking possession. Although there be no such confusion of goods as to absolutely destroy their separate identity, yet, if they cannot be separated without the mortgagor's aid, the same mischief would be produced as that which follows a confusion of goods. If the mortgagor refuse to point out the mortgaged goods, so as to enable the mortgagee to select them from others with which the mortgagor has mingled them, the latter cannot complain if the mortgagee seize the whole. Neither can other creditors of the mortgagor complain of such seizure, if it be made before they have acquired definite rights by attachment or levy. Before that time the mortgagor could lawfully have delivered his new goods to the mortgagee by way of pledge, or could have mortgaged them. What he could have done voluntarily is no more valid against him than what binds him by estoppel; and therefore a mortgagee has a perfect right, as against other creditors who have not obtained liens upon the goods, to enforce his mortgage

¹ *Frost v. Willard*, 9 Barb. (N. Y.) 440.

² *Adams v. Wildes*, 107 Mass. 123; *Kreuzer v. Cooney*, 45 Md. 582.

³ *Willard v. Rice*, 11 Met. (Mass.) 493.

⁴ *Fuller v. Paige*, 26 Ill. 358.

⁵ *Kreuzer v. Cooney*, *supra*; *Hart v. Ten Eyck*, 2 Johns. (N. Y.) Ch. 62, 108; *Dunning v. Stearns*, 9 Barb. (N. Y.) 630; *Brackenridge v. Holland*, 2 Blackf. (Ind.) 377.

against all the mixed goods. If attachments or levies of executions be made upon such goods after the mortgagee has taken possession, these can affect only the remainder of the goods or the proceeds thereof after the mortgage is paid.¹

483. If the mortgagee by his fault or neglect permit the mortgaged goods to be intermingled by the mortgagor so that an officer having a writ or execution against the latter is unable, after making reasonable inquiry and effort, to distinguish them, and the mortgagee does not himself identify and point them out, the officer is justified in taking and selling the whole as the property of the debtor.² A mortgage of a stock of goods containing a clause by which it is attempted to embrace all goods which the mortgagor adds to the stock in the course of his business is regarded as giving permission to the mortgagor to commingle other goods with those on hand at the time of making the mortgage. The mortgage being ineffectual at law to convey the subsequently acquired goods, these are subject to seizure upon execution by a judgment creditor of the mortgagor; and the confusion of goods having taken place by the permissive act of the mortgagee, he is not allowed to defeat the rights of the judgment creditor by claiming the goods under his mortgage.³ If, under such a mortgage, the mortgagee has permitted sales to be made by the mortgagor, and the latter afterwards makes an assignment

¹ *People v. Bristol*, 35 Mich. 28.

² *Robinson v. Holt*, 39 N. H. 557. The property in controversy in this case was hay which was mortgaged in the spring of the year; and when the new crop was gathered the mortgagor pitched it over with the old hay covered by the mortgage, so that the old could not be distinguished or separated from the new. Fowler, J., delivering the opinion in this case, said: "The doctrine of the confusion of goods has been often discussed, and may be considered as clearly and distinctly settled. If the goods of several intermingled can be easily distinguished and separated, no change of property takes place, and each party may lay claim to his own. If the goods are of the same nature and value, although not capable of an actual separation by identifying each particular, if the

portion of each owner is known, and a division can be made of equal proportionate value, as in the case of a mixture of corn, coffee, tea, wine, or other articles of the same kind and quality, then each may claim his aliquot part; but if the mixture is undistinguishable because a new ingredient is formed, not capable of a just appreciation and division according to the original rights of each, or if the articles mixed are of different values or quantities, and the original values or quantities cannot be determined, the party who occasions, or through whose fault or neglect occurs, the wrongful mixture, must bear the whole loss." And see *Mowry v. White*, 21 Wis. 417.

³ *Hamilton v. Rogers*, 8 Md. 301; *Hubbell v. Allen*, 90 Mo. 574.

for the benefit of creditors, and the assignee sells the goods, the mortgagee is entitled to only such part of the proceeds as come from the sale of goods embraced in the mortgage, and the burden is upon him to show what goods sold by the assignee were subject to the mortgage lien. If he has allowed the goods mortgaged to be so intermingled with goods afterwards purchased as to prevent the ascertainment of those on hand when the mortgage was given, he must suffer the loss.¹

V. *The Rights of Subsequent Purchasers.*

484. A subsequent bona fide purchaser, within the meaning of the statutes making void as against such a purchaser a mortgage not duly recorded, filed or refiled, is one who becomes a buyer by mutual assent of the parties, express or implied; and not one who has unlawfully converted the mortgaged property, and has acquired title by the payment of a judgment for the value of the property obtained against him by the mortgagor or his assignee. The intent of the enactments upon this subject is to protect creditors and honest dealers against hidden and unknown liens, and not to protect wrong-doers. In an action of trover for conversion, the defendant cannot set up title in a third person, unless he connects himself with that title so that he may not be able to avail himself of the existence of the mortgage, and may be liable to the mortgagee for the value of his lien, after satisfying a judgment obtained by the mortgagor for the full value of the property. But if at the time of the recovery of such judgment there has been a default in the payment of the mortgage, so that the mortgagee has become the absolute owner subject only to the right of redemption, and has the right to immediate possession, so that he, as well as the mortgagor or his assigns, can maintain an action for the conversion, satisfaction of a judgment obtained by the latter for the full value of the property transfers to the judgment debtor the title of both, and an action to recover possession cannot afterwards be maintained against him by the mortgagee.²

A purchaser for value of the mortgagor in possession, without notice, actual or constructive, that the property is incumbered,

¹ *Rosenberg v. Thompson* (Ky.), 8 S. W. Rep. 895. ² *Marsden v. Cornell*, 62 N. Y. 215.

will hold it discharged of any prior incumbrance.¹ A purchaser with such notice acquires only the rights of the mortgagor.²

485. A purchaser of chattels upon execution sale, without notice of an unrecorded mortgage, is a subsequent purchaser as against whom the mortgage is void, whether the debt upon which the execution was issued was contracted before or after the mortgage was executed.³ And so one who purchases at a sale upon an execution issued upon a debt contracted with a subsequent creditor, without notice, is a subsequent purchaser entitled to protection, whether he himself had notice of the mortgage or not.⁴ In order to protect subsequent creditors of the mortgagor without notice of the mortgage, it is necessary to insure a good title to purchasers at sales under their executions, whether such purchasers have notice or not. The creditor's right to sell cures the infirmity there would else be in the title of an execution purchaser with notice. In case the purchaser is without notice whether the creditor was entitled to subject the chattel to his satisfaction or not, the purchaser may, in his own right, and on the ground of his own merit, interpose the statute between his purchase and the mortgage.⁵

486. A purchaser of mortgaged property, sold in violation of a statute making it a criminal offence to sell the mortgaged property without the written consent of the mortgagee, or without informing the purchaser of the mortgage, may show that the sale was made with the oral consent of the mortgagee, who is thereby barred of his right to set up his mortgage against the title of the purchaser.⁶ But a mortgagee's assent to a sale subject to the mortgage is no waiver of his mortgage as against one who buys the property from such first purchaser without actual notice of the mortgage or of the mortgagee's assent to the first sale, but his lien follows the property into the hands of the last purchaser.⁷

487. A purchaser who has in terms assumed the payment

¹ *Andrews v. Jenkins*, 39 Wis. 476.

² *McCandless v. Moore*, 50 Mo. 511.

³ *McKnight v. Gordon*, 13 Rich. (S. C.) 518.

Eq. 222.

⁴ *McKnight v. Gordon*, *supra*.

⁵ *McKnight v. Gordon*, *supra*.

⁶ *Stafford v. Whitcomb*, 8 Allen (Mass.),

⁷ *Oswald v. Hayes*, 42 Iowa, 104.

of an existing mortgage upon the property cannot object to the validity of it on the ground of an alleged defect in its execution, as that it was not recorded,¹ when the mortgagor does not interpose any objection upon that ground.² And so one who has purchased property subject to a mortgage, so that the amount of the mortgage forms a part of the consideration of the purchase, cannot deny its validity.³

An agreement in a second chattel mortgage, by the mortgagees, "to secure" to the first mortgagees the payment of their lien, and to charge to the account of the mortgagor the amount of the said lien, and out of the first moneys which might be passed to their credit, from any source whatever, to set aside the said amount as an indemnity against the first mortgage, is not such a contract as will support a judgment against the second mortgagee for the amount of the first mortgage.⁴

Where two mortgages stand upon equal footing, the written promise of one mortgagee that he will see the other paid gives priority to such other mortgage.⁵

488. But a purchaser or mortgagee of goods subject to a prior mortgage is not precluded from showing that such prior mortgage has been paid,⁶ or that it is absolutely void so that the holder of it could not recover anything notwithstanding the mortgagor's willingness to make it good. If the mortgage were merely voidable and not void, then the mortgagor could give validity to it. As against the first mortgagee, the second mortgagee is estopped to deny the existence of the prior mortgage; and he agrees to hold under his mortgage subject to any claim which the first mortgagee might by law enforce by virtue of his mortgage; but he is not precluded from showing that the first mortgage is

¹ *Dwight v. Scranton, &c. Lumber Co.* (Mich.) 36 N. W. Rep. 752.

² *Greither v. Alexander*, 15 Iowa, 470.

³ *Kellogg v. Secord*, 42 Mich. 318; 3 N. W. Rep. 868; *Pope v. Porter*, 33 Fed. Rep. 7.

The rights and liabilities of a purchaser who has purchased subject to a mortgage, or who has assumed the payment of an existing mortgage upon the property, are

fully considered in the author's treatise on Mortgages, §§ 735-770; and these rights and liabilities being for the most part the same, whether the property be real or personal, reference is made to that work for a statement of the law.

⁴ *Clapp v. Halliday* (Ark.), 2 S. W. Rep. 853.

⁵ *Sanders v. Barlow*, 21 Fed. Rep. 836.

⁶ *Barry v. Bennett*, 7 Met. (Mass.) 354.

at law a mere nullity.¹ Neither is he precluded from showing that the property was never subject to the mortgage referred to.²

A second mortgagee, in contesting the validity of a first mortgage upon the property, must show by proper evidence, aside from the instrument itself, that his own mortgage was given for a valuable consideration, or to secure an honest debt.³

489. A purchaser of property which is subject to a mortgage is not personally liable for the payment of the mortgage debt unless he expressly assumes such payment. An announcement made upon an auction sale of property, that it is sold subject to a chattel mortgage, and that the purchaser will have to comply with the conditions thereof, does not impose a personal obligation upon one who hears and assents to the announcement and becomes the purchaser, and no action can be maintained against him for the debt.⁴

But a purchaser who has assumed and agreed to pay a mortgage debt upon the property sold is personally bound to the mortgagee for the payment of such debt.⁵

490. Conversion by purchaser. — A purchaser of property upon which there is a valid mortgage who consumes or sells the property or any part of it, is liable to the mortgagee for the damages so occasioned him; and it makes no difference that the purchaser took the property in hostility to the mortgage, and denying that it was an existing lien.⁶

The measure of damages against one who has purchased mortgaged property and has sold it to a stranger, so as to be liable for a conversion, is the value of the property and interest thereon from the time of sale by the defendant and not from the time of his purchase.⁷

491. A purchaser of mortgaged property cannot be held liable for a conversion of it without a definite demand by the mortgagee, or a definite refusal to surrender it. A mortgage of

¹ *Housatonic & Lee Banks v. Martin*, 1 Met. (Mass.) 294

² *Barry v. Bennett*, 7 Met. (Mass.) 354.

³ *Baskins v. Shannon*, 3 N. Y. 310.

⁴ *Hamill v. Gillespie*, 48 N. Y. 556.

⁵ *Pope v. Porter*, 33 Fed. Rep. 7.

⁶ *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396.

⁷ *Barry v. Bennett*, *supra*.

parts of organs finished and unfinished, together with other property in the mortgagor's factory, contained a condition against removal without the mortgagee's written consent. The mortgagee subsequently finding parts of an organ in a church, told a committee authorized to represent the church that he had a mortgage which included their organ, or parts of it, and demanded the property, at the same time exhibiting the mortgage. The committee replied that they knew nothing about it, and refused to do anything. It was held that there was no evidence of conversion.¹

VI. *Rights of Subsequent Mortgagees.*

492. Under the registry laws, subsequent mortgages of the same property may be made, which will be valid against all but those claiming under prior mortgages, inasmuch as these laws dispense with the necessity of a formal delivery of the property, making the record of the mortgage equivalent to a delivery of the property.² A subsequent mortgage conveys only an equitable title in the property; and it conveys a title subject to all the existing rights and equities of the prior mortgagee.³

A subsequent mortgagee acquires no rights as against his prior mortgagee by first taking possession of the mortgaged property. Where there were two mortgages of crops to be grown, and the second mortgagee took possession of the crops when they were grown, and harvested and threshed them, the first mortgagee was not estopped from asserting his claim, though knowing that the second mortgagee had taken possession he made no claim till the crops were threshed.⁴

493. A mortgagee is *pro tanto* a purchaser. He is entitled to rely upon the record in the same way that any purchaser may rely upon it. He is unaffected by any lien or incumbrance upon the property, such, for instance, as a prior mortgage or a vendor's lien for purchase money, of which he has no actual notice, and no constructive notice by record.⁵ A mortgagee is entitled to rely upon the mortgagor's possession the same as any purchaser

¹ *Ware v. Georgetown Congregational*
Soc. 125 Mass. 584.

² *Smith v. Smith*, 24 Me. 555.

³ *Shoenberger v. Mount*, 1 Handy
(Ohio), 566.

⁴ *Bradley v. Gelkinson*, 57 Iowa, 300.

⁵ *Manny v. Woods*, 33 Iowa, 265;
Plaisted v. Holmes, 58 N. H. 619; 1 Jones
on Mortgages, § 710.

may rely upon the possession of his vendor. He is unaffected by a prior verbal contract by his mortgagor to sell the property, although the purchaser has paid the price, but has left the property in the vendor's possession.¹ Bare knowledge by a mortgagee that the mortgaged goods were manufactured for another is not sufficient to charge him with notice of his rights.² Although the mortgagor obtained possession of the mortgaged goods by means of fraudulent representations, his mortgagee, without notice of the fraud, is unaffected by it.³

A senior mortgagee, having actual notice of a junior mortgage of a portion of the same property, cannot release that portion of the property not covered by his mortgage so as to throw the whole burden of his mortgage upon the property covered by the junior mortgage. The value of the part of the property so leased will be deducted from the amount due upon the senior mortgage before this can be charged upon the property covered by the junior mortgage.⁴

494. One who takes a mortgage in terms made subject to a prior mortgage named, acquires only a right to redeem the property from such prior mortgage, and though his mortgage be first recorded, it does not take precedence of such other mortgage.⁵ The second mortgagee, in such case, stands in the place of the mortgagor, having the same rights and coming within the exception of a statute which provides that recorded mortgages "shall not be valid against any person other than the parties thereto." The legal effect of such a mortgage is the same as if it had been in terms of the right of the mortgagor to redeem the first mortgage.⁶ His right to redeem continues until the foreclosure of the first mortgage, unless defeated by some other paramount title.⁷

495. If a mortgage be made and recorded of goods under attachment at the time, notice of the same also being given to the attaching officer, the property passes to the mortgagee subject

¹ *Hesser v. Wilson*, 36 Iowa, 152.

² *Hesser v. Wilson*, *supra*.

³ *Kranert v. Simon*, 65 Ill. 344.

⁴ *Jones on Mortgages*, §§ 722, 723;

Guion v. Knapp, 6 Paige (N. Y.), 35;

Jordan v. Hamilton Co. Bank, 11 Neb.

499.

⁵ *Pecker v. Silsby*, 123 Mass. 108;

Dwight v. Scranton, &c. Lumber Co. (Mich.) 36 N. W. Rep. 752.

⁶ *Howard v. Chase*, 104 Mass. 249;

Tuite v. Stevens, 98 Mass. 305.

⁷ *Treat v. Gilmore*, 49 Me. 34.

to the lien created by the attachment ; and if the goods be sold by the officer pending the attachment, and the plaintiff fails in his suit, the proceeds of the sale in the officer's hands belong to the mortgagee, who may recover them directly of the officer.¹ It is not competent for the officer in such case to show that he did not receive actual payment for the property.²

496. The first mortgagee having the right of property and the right of possession may sell the property to a third person subject only to the mortgagor's right of redemption ; and a subsequent mortgagee cannot maintain an action for the conversion of it against such purchaser.³ He has no better title than the mortgagor as against a prior mortgage duly recorded. His only right is a right to redeem.

497. A second mortgagee is entitled to possession according to the terms of his mortgage against all the world, except the first mortgagee whose debt remains unpaid, and he may maintain an action for possession as against any one else.⁴ To an action of replevin against the mortgagor, a prior mortgage is no defence if that permits the mortgagor to remain in possession until breach of condition, and there is no evidence that the prior mortgagee has made any claim upon the mortgagor.⁵

498. If a second mortgagee sell the mortgaged property with the consent of the first mortgagee, the latter cannot maintain an action against him as for a conversion, although such consent was given under a false impression as to the respective rights of the parties to the proceeds of such sale, or as to the views of the second mortgagee on this matter, such false impression not having been created by fraud on his part. The consent to the sale operates as a waiver of the tort that would otherwise have arisen from the wrongful conversion of the property by the second mortgagee.⁶ But, of course if the second mortgagee, without such consent, takes the property from the possession of the first mortgagee and sells it without regard to his rights, and re-

¹ *Appleton v. Bancroft*, 10 Met. (Mass.) 231.

² *Appleton v. Bancroft*, *supra*.

³ *Landon v. Emmons*, 97 Mass. 37.

⁴ *Newman v. Tymeson*, 13 Wis. 172 ; *Treat v. Gilmore*, 49 Me. 34.

⁵ *Adams v. Wildes*, 107 Mass. 123.

⁶ *Anderson v. Case*, 28 Wis. 505.

ceives the full consideration of the sale, he is liable to the latter for a conversion of the property.¹

499. A subsequent mortgagee not in possession cannot maintain trover, or an action in the nature of trover, for a conversion of the property.² To maintain such an action, the plaintiff must be entitled to the possession at the time of the conversion. It is not enough that he has an equitable title, such as a right to redeem. This right of action is in the first mortgagee. The defendant cannot be held in two actions of the same kind at the same time, for the same tort, in favor of different persons. Nor can the rights of the first mortgagee be defeated by a subsequent mortgage. Therefore the first mortgagee alone can maintain an action of tort for a conversion of the property.³ A subsequent mortgagee has no greater rights than the mortgagor had as against a first mortgage duly recorded.

A decision in apparent contradiction of the proposition that a second mortgagee not in possession cannot maintain trover was made in Maine, where it was held that he might maintain an action of trover against an officer who had attached and sold the mortgaged goods, his mortgage being paramount to the attachment, and the equity of redemption not having been extinguished under the first mortgage. The attachment and sale of the property destroyed the right of redemption of the second mortgagee, and the officer was liable in damages for that destruction to the amount of the value of the property above the first mortgage.⁴ But the facts of the case show that the second mortgage covered property of which a part only was subject to a prior mortgage. The entire property was sold under execution, and the holder of the first mortgage recovered judgment, which, of course, only covered his interest in the property. In the subsequent suit by the second mortgagee, allowance was made in the judgment for the amount already recovered by the first mortgagee. The recovery of the first judgment and its payment operated to discharge the

¹ *Lowe v. Wing* (Wis. 1882), 13 N. W. Rep. 892.

² *Clapp v. Campbell*, 124 Mass. 50; *Landon v. Emmons*, 97 Mass. 37; *Rugg v. Barnes*, 2 Cush. (Mass.) 591.

³ *Ring v. Neale*, 114 Mass. 111; *Rugg v. Barnes*, *supra*; *Goodrich v. Willard*, 2 Gray (Mass.), 203.

⁴ *Treat v. Gilmore*, 49 Me. 34. If the title of the first mortgagee has become absolute before the conversion of the property, the second mortgagee can of course maintain no action. *Clapp v. Glidden*, 39 Me. 448.

first mortgage, and was properly allowed in mitigation of damages as a payment which had enured to the benefit of the second mortgagee. It would seem, therefore, that the rule above stated was not necessarily encountered in that case. It is doubtful, at least, whether, without the features in the case above indicated, the rule would have been disregarded.¹

500. The interests of successive mortgagees are distinct, and they must sue separately for injuries to their several interests. They are neither joint tenants nor tenants in common of the property.²

The fact that several chattel mortgages were executed at the same time does not make them all a part of one transaction, so that the invalidity of one for lack of sufficient consideration attaches to all.³

VII. *Rights of Assignees.*

501. The assignee of a mortgage and the note secured by it is a purchaser in the same way that a mortgagee is a purchaser. The assignee without notice stands upon the same footing as a *bonâ fide* mortgagee. He is entitled to the same protection as any *bonâ fide* grantee without notice. He is entitled to rely upon the record, and when that discloses an unimpeachable title he receives the protection of the law as against unknown liens and incumbrances prior to the mortgage, and as against latent defects.⁴ The legal effect of the assignment is to transfer the entire interest of the mortgagee in the property to the assignee, who thereupon, in place of the mortgagee, becomes the general owner. If the mortgagee was entitled to the possession of the property, the legal effect of his assignment is the same as if he had been in possession of the property, and had sold and delivered it to the assignee.⁵ His assignee may recover possession in the same manner that the mortgagee himself might have recovered it.⁶

¹ Ring v. Neale, 114 Mass. 111, per Colt, J. & C. 128; Mayer v. Soulier, 48 Mich. 411; S. C. 12 N. W. Rep. 632.

² Newman v. Tymeson, 13 Wis. 172.

See 1 Jones on Mortgages, § 475.

³ Hoey v. Pierron (Wis.), 30 N. W. Rep. 692.

⁵ Robinson v. Fitch, 26 Ohio St. 659; Moody v. Ellerbe, 4 S. C. 21.

⁴ Pierce v. Faunce, 47 Me. 507; Gould v. Marsh, 1 Hun (N. Y.), 566; S. C. 4 T.

⁶ Barbour v. White, 37 Ill. 164; Russell v. Walker, 73 Ala. 315; Graham v. Newman, 21 Ala. 497.

502. An assignment by a mortgagee of all his interest in a mortgage, and everything therein contained, with authority to the assignee to take all legal measures for the recovery to his own use and enjoyment of the assigned premises, is an assignment of the debt secured.¹ A sale and delivery of the mortgaged property by a mortgagee in lawful possession, by virtue of a voluntary surrender by the mortgagor, transfers all his rights as mortgagee, and entitles the purchaser to take and retain possession, as against the mortgagor at least, until the debt is paid.² The assignee acquires the same right that the mortgagee had to take possession under a safety clause, or under a clause providing for the taking of possession if any attachment or execution should be levied upon the property.³

The assignee, though he has paid only a small part of the whole mortgage debt for the assignment, can enforce the mortgage for the whole amount due the mortgagee under it.⁴ The assignment invests the assignee with a power of sale given by the mortgage to the mortgagee or his assigns.⁵

503. An assignment of the debt secured passes all the mortgagee's equitable interest in the mortgaged property, whether the assignment be before or after forfeiture.⁶ The debt is the principal thing, and the mortgage an incident only. If the debt be in the form of a negotiable promissory note, the assignee by indorsement takes the mortgage as he takes the note, free from any equities which existed in favor of third persons while it was held by the mortgagee.⁷ If the debt be not a negotiable one,

¹ *Jones v. Huggefords*, 3 Met. (Mass.) 515; *Barbour v. White*, 37 Ill. 164. So by statute in Idaho Territory, R. S. 1887, § 3360.

² *Sirrine v. Briggs*, 31 Mich. 443.

³ *Beach v. Derby*, 19 Ill. 617.

⁴ *Ganong v. Green* (Mich.), 38 N. W. Rep. 661.

⁵ *Campbell v. Woodstock Iron Co.* (Ala.) 3 So. Rep. 369.

⁶ *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Gould v. Marsh*, 1 Hun (N. Y.), 566; *Johnson v. Hart*, 3 Johns. (N. Y.) Cas. 322; *Ellett v. Butt*, 1 Woods, 214; *Tison v. People's Sav. & Loan Ass.* 57 Ala. 323; *Gaff v. Harding*, 48 Ill. 148, 150; *Wood-*

ruff v. King, 47 Wis. 261; 2 N. W. Rep. 452; *Croft v. Bunster*, 9 Wis. 503; *Rice v. Cribb*, 12 Wis. 179; *Prout v. Root*, 116 Mass. 410, 413; *Crain v. Paine*, 4 Cush. (Mass.) 483, 487; *Ramsdell v. Tewksbury*, 73 Me. 197; *Martindale v. Burch*, 57 Iowa, 291; *Harman v. Barhydt* (Neb.), 31 N. W. Rep. 488; *Studebaker Manuf. Co. v. McCurgur*, 30 N. W. Rep. 686; *Batchelder v. Jenness* (Vt.), 7 Atl. Rep. 279; *Lee v. Clark* (Mo.), 1 S. W. Rep. 142.

See 1 *Jones on Mortgages*, §§ 813-822.

⁷ *Carpenter v. Longan*, 16 Wall. 271; *Gould v. Marsh*, *supra*.

the assignee must abide by the case of the original mortgagee, and take that as well as the mortgage subject to the equities.¹ If the debt be in the form of a negotiable note, but the assignee takes no indorsement of it, his interest is subject to existing equities; he acquires only an equitable interest.²

In an action of trover, by a purchaser of a mortgaged mule, against an assignee for value of the mortgage, who had bought in the mule at a defective foreclosure sale, the defendant, where judgment is given plaintiff for the value and hire of the mule, is entitled under an equitable plea to set off against the judgment the value of the mule.³

An assignment of a part of the debt secured carries with it *pro tanto* the mortgage security; and a subsequent payment of such part so transferred extinguishes the mortgage as to the part so transferred, leaving it operative as to the part unpaid.⁴

The mortgagee's legal interest does not, however, pass by his assignment of the debt. Such assignee cannot maintain replevin in his own name for the mortgaged property; though he may, in the absence of any express or implied stipulation to the contrary, bring such an action in the name of the mortgagee, who holds, in such case, the legal title in trust for such assignee's benefit.⁵ In like manner such assignee cannot maintain trover for a conversion of the mortgaged property, but may maintain such action in the name of the mortgagee.⁶

504. Assignment of part of the debt secured. — Ordinarily an assignment of one of several notes secured by a mortgage, or an assignment of any distinct part of the indebtedness secured, carries with it a *pro tanto* interest in the mortgage.⁷ Such was

¹ Batchelder v. Jenness (Vt.), 7 Atl. Rep. 279.

² Nelson v. Ferris, 30 Mich. 497.

³ Rogers v. Lawrence (Ga.), 3 S. E. 559.

⁴ Emmons v. Dowe, 2 Wis. 322.

⁵ Ramsdell v. Tewksbury, 73 Me. 197.

⁶ Crain v. Paine, 4 Cush. 483, 487, per Wilde, J.: "The delivery of a note of hand, or other chose in action, to an assignee, for a valuable consideration, without an assignment in writing, is a valid assignment in equity, which courts of law will take notice of and protect. And the

assignment of a mortgage of personal property by delivery stands on the same footing and is entitled to the same protection. By such an assignment, however, the legal estate did not pass to the plaintiff, and this action could not be maintained in his own name, before the assignment in writing; yet he might maintain an action for conversion of the property so equitably assigned in the name of the assignor, which action the assignor would have no right to discharge."

⁷ Studebaker Manuf. Co. v. McCurgur,

held to be the effect even of an assignment of a certain amount of the mortgage moneys with a right of priority of payment. The assignee was held to be authorized to dispose of so much of the mortgaged property, that being a stock of goods, as might be necessary to pay the amount for which the assignment was made.¹

An assignment of "so much of a mortgage and property therein described as will amount to" a certain sum, less than the mortgage debt, passes no legal title to the mortgage, as against a subsequent purchaser from the mortgagee without actual notice of the assignment, although the assignment was recorded before such purchase. Such a partial assignment might be construed to be of the nature of a declaration of trust on the part of the mortgagee, binding him in equity to account with the assignee. But it would not make such assignee a tenant in common with himself. The legal title would still remain in the mortgagee, so that a subsequent sale by him would be good.²

But in the ordinary case of an assignment of a partial interest in a mortgage it would seem that the assignee would become a tenant in common of the mortgaged property to the extent of their respective interests. If thereupon the assignor fairly and without fraud forecloses the mortgage and sells the property, the only remedy of the assignee would be an action against his assignor to recover his proportionate share of the proceeds of the sale.³ If, however, the sale be fraudulent, and the purchaser be a party to the fraud, the interest of the assignee is not divested; but as the assignor would be estopped to allege that the sale was fraudulent, the assignee would become a tenant in common of the mortgaged property with the purchaser, and either might hold it for both.⁴

505. An assignment of a mortgage without the debt secured by it is either a nullity or a transfer of the legal title in

20 Neb. 500; *Harman v. Barhydt*, 20 Neb. 625; 31 N. W. Rep. 488.

Where part of the notes secured by a chattel mortgage have been assigned, the assignee is entitled to intervene in an action of replevin brought by the mortgagee to recover possession of the goods. *Harman v. Barhydt*, *supra*.

¹ *Emmons v. Dowe*, 2 Wis. 322. See 1 Jones on Mortgages, § 821.

² *French v. Haskins*, 9 Gray (Mass.) 195. In this case the mortgagee had expressly declined to execute a full assignment of the mortgage because he was unwilling to lose control of the mortgaged property.

³ *Earll v. Stumpf*, 56 Wis. 50; 13 N. W. Rep. 701.

⁴ *Earll v. Stumpf*, *supra*.

trust for the benefit of the holder of the debt.¹ But if it appear to have been the intention of the parties to transfer a beneficial interest in the mortgage, an assignment of the mortgage will generally be held to pass the mortgage debt as well.² This is in accordance with the maxim, that when a thing is granted everything possessed by the grantor which is necessary to make the grant effectual passes as incident thereto.³ A mortgage is incident to the debt secured and not to the note, which is merely evidence of the debt.⁴ The retention of the note by the assignor is not, at any rate, conclusive of his intention not to transfer the debt with the mortgage.

Thus, where a loan was made to a mortgagor upon his agreeing to procure as security an assignment of a chattel mortgage already existing upon his property and in part due, and the mortgagee thereupon executed to the lender an assignment of the mortgage, which was in its terms a transfer of all right and title in the mortgage until the assignee should be fully paid, but did not transfer the mortgage note, it was held that, if essential to give effect to the assignment, the assignee might be regarded as having acquired an interest in the debt for which both the note and the mortgage were securities; and that the legal effect of the transaction was to transfer to the assignee the property embraced in the mortgage as security for his advances.⁵

506. An assignment by a mortgagee not in possession has the same legal effect as an assignment by a mortgagee in possession. It passes his entire interest in the property, and the assignee becomes entitled to all the rights of the mortgagee. If the latter is entitled to possession, his assignee in like manner is entitled to possession.⁶

507. The mortgagee's assignable interest continues so long as he has a subsisting mortgage. He has an assignable interest in a mortgage although he has seized the property upon default.

¹ Polhemus v. Trainer, 30 Cal. 685.

See 1 Jones on Mortgages, § 804; Lucas v. Harris, 20 Ill. 165; Earll v. Stumpf, 56 Wis. 50.

² Campbell v. Birch, 60 N. Y. 214; Earll v. Stumpf, *supra*; Hamilton v. Browning, 94 Ind. 242.

³ Broome's Leg. Max. 464.

⁴ Hill v. Beebe, 13 N. Y. 556.

⁵ Campbell v. Birch, *supra*.

⁶ Robinson v. Fitch, 26 Ohio St. 659;

Cotton v. Watkins, 6 Wis. 629.

His interest continues assignable until the right of redemption is barred by lapse of time or otherwise.¹

When a mortgagee has the right to declare the mortgage debt due and the mortgage forfeited and to take possession of the property, if any execution be levied upon the property, or it be attached for a debt of the mortgagor, he may exercise his own choice about asserting this right; and until he does some affirmative act to declare the mortgage forfeited, he may assign it as a subsisting mortgage. His assignee would then acquire the same right that the mortgagee himself had to declare the mortgage forfeited.²

508. An assignee in insolvency who has taken possession of personal property mortgaged in fraud of creditors, and filed a bill in equity to prevent a transfer of the mortgage by the mortgagee, may hold the property as against one to whom the mortgage and the note which it was given to secure were assigned for a good consideration and without notice. If such assignee takes possession of the property and converts it to his own use before the purchaser acquires any title, he holds the elder and better title. He has avoided the mortgage. If the purchaser of the mortgage had acquired title in good faith and for a valuable consideration, before any act had been done to avoid the mortgage, he would have stood on different ground.³

509. A mortgagee, after assigning his mortgage, cannot maintain an action for an unlawful conversion against an officer who had previously attached the mortgaged property in an action against the mortgagor. The assignment passes to the assignee the legal title to the property, subject to the attachment, and leaves no interest in the mortgagee which would authorize a demand or a suit in his name.⁴ Suit would necessarily be in the name of the assignee, to whom passed all the interest the mortgagee had.⁵

An assignee of a note secured by a mortgage of personal property should maintain trespass against a stranger taking possession

¹ *Moody v. Ellerbe*, 4 S. C. 21.

² *Beach v. Derby*, 19 Ill. 617.

³ *Bigelow v. Smith*, 2 Allen (Mass.),

⁴ *Horne v. Briggs*, 98 Mass. 510.

⁵ *Langdon v. Buel*, 9 Wend. (N. Y.) 80.

of the property in his own name, and not in the name of the assignor.¹

510. A right of action for an injury to the property or to the mortgagee's rights does not pass by his assignment of the mortgage. Thus, an assignee cannot sue for a conversion of property which has taken place before the execution of the assignment. The assignment passes all the mortgagee's right to the property, but does not pass his right to sue for a conversion of the property, or for injuries to it, while he was the legal owner of it.²

511. A mortgage that has been paid cannot be revived by an assignment of it, even with the mortgagor's consent, and although the assignment be upon a valuable consideration. Thus, a mortgage having been given to save the mortgagee harmless against his liability as surety upon a note, the mortgagor afterwards procured a cancellation of the note, and the substitution of a new one in its stead, with a different surety. Contemporaneously with the cancellation of the old note and the substitution of the new one, by arrangement between the parties, the mortgage was assigned to the new surety. It was held that no interest in the mortgaged property passed to the assignee because the mortgage had been extinguished.³

512. A mortgage given to a surety enures to the benefit of the creditor to whom the surety is bound;⁴ and upon the bankruptcy of the mortgagor, a court of bankruptcy will enforce the trust. If the mortgage upon its face be conditioned to indemnify the mortgagee against a liability upon certain debts, it expresses a trust; and one who purchases the mortgage, or takes an assignment of it, takes it with notice of such trust and subject to it. The sale and assignment are then void in equity, and the assignee will be regarded as merely holding the legal title to the property as trustee in place of the original trustee.⁵

To give a creditor the right to be substituted to the place of a

¹ Langdon v. Buel, 9 Wend. (N. Y.) 80.

⁴ Troy v. Smith, 33 Ala. 469. See 1

² Bowers v. Bodley, 4 Bradw. (Ill.) Jones on Mortgages, §§ 874-885.

⁷⁹; S. C. 12 Chicago L. N. 52.

⁵ Ex parte White, 2 Lowell, 343.

⁸ Brooks v. Ruff, 37 Ala. 371.

surety who holds a mortgage given to indemnify him against his liability to the creditor, the claim of the latter on the surety must be valid, binding, and capable of being enforced immediately against him. If the relation of creditor and debtor has never existed between them, or having existed it has been terminated by release, or payment, or in any other mode, there can be no substitution.¹

513. The assignee takes free from all equities in favor of the mortgagor if the mortgage secures negotiable paper not overdue.² In a few states, however, this general and prevailing rule is rejected, and the assignee is held to take such a mortgage subject to all equities between the original parties.³

If the mortgagee had notice of a prior unrecorded mortgage, the assignee takes his place, and is chargeable with the notice which the mortgagee had.⁴

If the mortgage secures a non-negotiable debt, the assignee acquires no greater interest than that which the mortgagee could enforce against the mortgagor.⁵ A creditor who buys a chattel mortgage given by his debtor has no greater right under it than any other assignee. As purchaser and assignee he acquires only the mortgagee's rights; though as creditor he might contest the validity of the mortgage by attaching or levying on the goods.⁶

Parol evidence is admissible to show that a mortgagee had agreed with his mortgagor to accept half of the amount of the mortgage debt in satisfaction, and that the mortgagee assigned the mortgage as a security for only half the nominal amount of it, and not absolutely.⁷

514. And so if a mortgage securing a negotiable note given as an indemnity for indorsements, made by the mortgagee for

¹ *Constant v. Matteson*, 22 Ill. 546.

² The rule is the same as that relating to assignees of mortgages of real property. See 1 *Jones on Mortgages*, §§ 834-847; *Judge v. Vogel*, 38 Mich. 568, 569; *Gould v. Marsh*, 4 T. & C. (N. Y.) 128; *S. C.* 1 Hun, 566.

³ *Bryant v. Vix*, 83 Ill. 11; *Brooks v. Record*, 47 Ill. 30; *Petillon v. Noble*, 73 Ill. 567; *Oster v. Mickley*, 35 Minn. 245. He does not, however, take subject to the

latent equities of third parties. *Brooks v. Record*, *supra*; *Barbour v. White*, 37 Ill. 164.

⁴ *Hoagland v. Shampamore*, 37 N. J. Eq. 588; *Conover v. Van Mater*, 18 N. J. Eq. 481; *Decker v. Boice*, 83 N. Y. 215.

⁵ *Judge v. Vogel*, 38 Mich. 568.

⁶ *Judge v. Vogel*, *supra*.

⁷ *Stewart v. Brown*, 48 Mich. 383; *S. C.* 12 N. W. Rep. 499.

§§ 515-518.] RIGHTS OF THE PARTIES BEFORE FORFEITURE.

the mortgagor's accommodation, be assigned before the liability upon the indorsed notes has become fixed, and the assignee be a purchaser for value without notice, he will not be affected by the equities between the original parties; and if he be not a purchaser for value, or if he have notice of the mortgagor's equities, he will take the same rights the mortgagee had. If the mortgagee, after such assignment, pay the indorsed notes, the assignee in the latter case will take the benefit of such payments to the same extent that the mortgagee would have done had he made no assignment.¹

515. If a mortgage given to secure future advances be assigned, before any advances are made under it, to one who supposes the mortgage was given for an actual indebtedness, the assignee obtains no greater rights than the mortgagee had, unless the mortgage debt be represented by negotiable paper; but in that case an assignee before maturity would hold the paper and mortgage discharged of all preëxisting equities.²

516. A mortgage made for the temporary accommodation of the mortgagee is not subject to defence for that reason in the hands of a *bonâ fide* assignee; neither is it any defence as against such assignee that the mortgagee agreed to use the mortgage only as collateral security, but instead of this raised the money upon it; nor that the mortgagee, in order to obtain the accommodation, falsely represented himself to be solvent.³

517. An assignment of a chattel mortgage need not be under seal unless the mortgage itself is required by statute to be executed under seal.⁴

518. An assignment need not be recorded. The statutes

¹ Potter v. Holden, 31 Conn. 385.

² Judge v. Vogel, 38 Mich. 568.

³ Jacobsen v. Dodd, 32 N. J. Eq. 403; S. C. 10 Rep. 53. "A security made for the accommodation of another, on which it was understood that the money should be realized in a particular manner, is not fraudulently misappropriated if the money is obtained in a different way from that

which was intended. If its negotiation effects the substantial purpose for which it was designed, it is not material whether it was effected in the precise manner contemplated, unless the interest of the party making it is prejudiced by the manner in which it was used." Per Depue, J.

⁴ Gilchrist v. Patterson, 18 Ark. 575.

relating to recording or filing chattel mortgages do not apply to assignments of such mortgages. Such a mortgage once having been properly recorded or filed, the rights of the mortgagee are secure against subsequent incumbrances made by the mortgagor, and an assignee of the mortgage takes the same rights, and holds them securely, without any record or filing of the assignment.¹ Although a mortgagor, after the mortgagee has assigned the mortgage to a third person as collateral security, conveys the mortgaged property to the mortgagee by bill of sale, in payment of his debt, without the knowledge or consent of the assignee, and the bill of sale is put upon record by the mortgagee, the mortgage is not cancelled or affected thereby, although the assignment be not recorded. The mortgagee acquires by such conveyance merely an equity of redemption in the mortgaged property.² A mortgagor paying his mortgage debt without receiving the note or bond secured, or even the mortgage itself, assumes his own risk as to making payment to the proper person; for the non-production of these instruments by the mortgagee is a suspicious circumstance, and is sufficient to put the debtor upon inquiry, and ordinarily to make him chargeable with knowledge of the fraud, and render him still liable to the assignee upon his bond or note for the mortgage debt.³

519. There is no warranty of title to the mortgaged goods implied in an assignment by a mortgagee of his interest in the mortgage.⁴ There is no warranty of title on his part, unless he makes it in express terms.

¹ *Bigelow v. Smith*, 2 Allen (Mass.), 264, per Hoar, J.: "A mortgage duly recorded gives certain rights to the mortgagee, created and defined by the statute; but the statute does not change the nature of the property, nor require that all subsequent changes in title shall be shown upon the record. An assignment or release of the mortgage is not required to be recorded. The mortgagor and mortgagee may join in a sale, which will give a perfect title to the chattel sold, and the record furnish no evidence of it." Also see *Hall v. Redding*, 13 Cal. 214.

In Idaho Territory, the record of the assignment of a mortgage is not of itself notice to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee. The assignment of a debt secured by mortgage carries with it the security. R. S. 1887, §§ 3359, 3360.

² *Baxter v. Gilbert*, 12 Abb. (N. Y.) Pr. 97.

³ *Baxter v. Gilbert*, *supra*, per Hilton, J.

⁴ *Jones v. Huggesford*, 3 Met. (Mass.) 515.

CHAPTER XI.

MORTGAGES OF SHIPS.

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| I. Laws of the United States in regard to recording, 520-531. | III. Rights and liabilities of the parties, 540-549. |
| II. Priority as between mortgages and liens, 532-539. | IV. Remedies for enforcing such mortgages, 550-554. |

I. Laws of the United States in regard to Recording.

520. The statutory enactment of the United States upon this subject is as follows:¹ No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by this statute.² The collectors of the customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and also all certificates for discharging and cancelling any such conveyances, in books to be kept for that purpose, in the order of their reception; noting in such books, and also on

¹ R. S. §§ 4192-4194; Act of July 29, 1850.

² The object of this proviso was to make it entirely clear that a bottomry bond did not come within the statute, as it might otherwise be contended that it was in some sense a hypothecation of the vessel, and therefore required to be recorded. It cannot be contended that such a lien only is out of the purview of the statute, and that all other liens not recorded are to be post-

poned to that of a mortgagee. Thus a lien for repairs may be created by a local statute and given priority to a recorded mortgage. The *Wm. T. Graves*, 14 Blatchf. 189.

See, however, *The Kate Hinchman*, 7 Biss. 238, where Judge Drummond was of opinion that the proviso refers to maritime liens, and not to those created by statute. And see *Scott's case*, 1 Abb. (U. S.) 336. See, also, §§ 536-539.

the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received; and shall certify on the bill of sale, mortgage, hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; but no bill of sale, mortgage, hypothecation, conveyance, or discharge of mortgage or other incumbrance of any vessel, shall be recorded, unless the same is duly acknowledged before a notary public, or other officer authorized to take acknowledgment of deeds. The collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the purchaser or mortgagee, and shall permit such index and books of records to be inspected during office hours, under such reasonable regulations as they may establish; and shall, when required, furnish to any person a certificate, setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, if inserted in the register or enrolment, and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel recorded since the issuing of the last register or enrolment, namely, the date, amount of such incumbrance, and from and to whom or in whose favor made.¹

521. The mortgage should be recorded in the office of the collector of the port which is the home port of the vessel, and not the port of last registry or enrolment when not such home port.² The laws provide for a temporary registry when the

¹ The collector shall receive for each such certificate one dollar.

² *Blanchard v. The Martha Washington*, 1 Cliff. 463; *Hays v. Pacific Mail Steamship Co.* 17 How. 596, 598; *Johnson v. Merrill*, 122 Mass. 153; *White's Bank v. Smith*, 7 Wall. 646; overruling *Potter v. Irish*, 10 Gray (Mass.), 416, and *Chadwick v. Baker*, 54 Me. 9, which hold that record should be made in the district of last registry, though not the home port of the vessel.

In *White's Bank v. Smith*, *supra*, Nelson, J., said: "Her name, and the name of her home port, remain painted on her stern, notwithstanding this temporary document, and satisfy the requirement of the

act in that respect, and both continue until a new home port is acquired by a change of ownership, requiring a permanent registry or enrolment on account of the different residences of the owners, when the name of that port is substituted. And, confining the record to the home port, there is great propriety and convenience in requiring bills of sale and mortgages of the whole or parts of a vessel to be made matters of record in this office, as in the registries there are all the names of all the owners under oath, together with their residences. . . . There can be very little difficulty on the part of a purchaser or mortgagee in ascertaining the true condition of the title of a vessel,

owner acquires title to a vessel in a district other than that in which he resides ; but this is to enable him to bring the vessel to the home port, where she can obtain her permanent registry. The character of this temporary registry is expressed upon the face of it, and is delivered up to the collector on the issuing of the permanent registry. This temporary registry continues only until the vessel arrives at the port to which she belongs, and where she may obtain a renewal of her permanent documentary title.

A record of a mortgage in the collector's office of a port which is not the home port of the vessel affords the mortgagee no protection as against subsequent purchasers and creditors without notice.¹

522. This statute² is limited in terms and effect to vessels of the United States.³ If, upon the sale of a vessel already enrolled to a person residing at another port, no new register or enrolment, such as is required by statute,⁴ is taken out or applied for, she ceases to be a vessel of the United States, and a subsequent mortgage of her acquires no validity by being duly recorded.⁵ In like manner the statute has no application to a vessel which has never been registered or enrolled at all under the laws of the United States. A mortgage of such a vessel must be recorded in accordance with the statutes of the state relating to the recording of personal mortgages where the vessel is at the time.⁶ Thus, if a mortgage be made of a vessel before it is registered or enrolled, and the mortgage is duly recorded according to the laws of the state where the vessel was at the time, and before the vessel is registered or enrolled it is attached, and after the registry or enrolment another mortgage is executed and duly recorded in the office of the collector of customs, the prior mortgage will be valid and effectual as against both the attachment and the subsequent mortgage.⁷

as it respects written evidences of the same, or of incumbrances thereon, from an examination of the records of the collector's office at the several home ports of the vessel, as the records of the last home port refer to the preceding one, the last bill of sale incorporating into it a copy of the previous certificate of registry."

¹ The John T. Moore, 3 Woods, 61.

² Stat. July 29, 1850, § 1 ; U. S. R. S. § 4192.

³ *Veazie v. Somerby*, 5 Allen (Mass.), 280.

⁴ U. S. Stat. Dec. 31, 1792, §§ 3, 14 ; Feb. 18, 1793, §§ 2, 5 ; U. S. R. S. §§ 4141, 4177, 4311, 4312.

⁵ *Johnson v. Merrill*, 122 Mass. 153.

⁶ *Veazie v. Somerby*, *supra* ; *Foster v. Perkins*, 42 Me. 168.

⁷ *Foster v. Perkins*, *supra*.

A mortgage of a ship on the stocks, to be built and completed afterwards, as security for advances made and to be made, is not valid as against attaching creditors, unless it be recorded as a mortgage of other chattels is required to be recorded in accordance with the state statute, or the property be actually delivered to and retained by the mortgagee.¹

523. Vessels of the United States are such as have been built in the United States and belong wholly to citizens of the United States, and have been registered as required by statute;² or if coasting vessels, such as have been enrolled and licensed as such.³ In the latter case a vessel must be both enrolled and licensed, to make her a vessel of the United States. In a suit in regard to the validity of a mortgage of a vessel recorded in the office of a collector of customs, the mortgagee must show that the vessel was of such a character or was owned in such a way that she became a vessel of the United States; and if the vessel be employed in the coasting trade, he must show that she was both enrolled and licensed. A purchaser or judgment creditor is not concluded by the fact that the mortgage was recorded in the custom-house.⁴

A canal boat or a scow is not a vessel of the United States within the meaning of the act relating to the recording of mortgages. The fact that such a boat is found upon a navigable river at the time it is taken upon attachment or upon execution is immaterial.⁵

A pleasure yacht is not within the meaning of the recording act.⁶

524. A mortgage of a vessel at sea is complete upon the delivery of the instrument, in case there be no statute requiring a record of it; but if the mortgagee neglects to take possession on the return of the vessel, the transfer is liable to be impeached by the mortgagor's creditors on the ground of fraud.⁷

¹ *Goodenow v. Dunn*, 21 Me. 86; and see *Bonsey v. Amee*, 8 Pick. (Mass.) 236.

² Act of Congress Dec. 31, 1792, § 1.

³ Act of Feb. 18, 1793, § 1.

⁴ *Best v. Staple*, 61 N. Y. 71; *Perkins v. Emerson*, 59 Me. 319; *Stinson v. Minor*, 34 Ind. 89; *Davidson v. Gorham*, 6 Cal. 343.

⁵ *Hicks v. Williams*, 17 Barb. (N. Y.) 523.

⁶ *Veazie v. Somerby*, 5 Allen (Mass.) 280.

⁷ *Badlam v. Tucker*, 1 Pick. (Mass.) 389; *Portland Bank v. Stubbs*, 6 Mass. 422; *Goodenow v. Dunn*, *supra*; and see *Davidson v. Gorham*, *supra*.

And so at common law a bill of sale of a ship by way of mortgage is good as against creditors, although it be made while the vessel is lying in port, and possession be not taken by the purchaser, if by the terms of the agreement of the parties the mortgagor is to have the conduct and management of the voyage on which the ship is then destined.¹

Under the present statutes of the United States, a mortgage to be valid must be recorded according to the terms of the statute. But a sale of a vessel at sea forfeits her national character, unless the new owner pursues all the requisites of the law to obtain a new registry within three days after her arrival in a port of the United States.² If, therefore, such purchaser mortgages the vessel while still at sea, neither the bill of sale nor the mortgage being registered at the port of departure where the vessel was registered, the vessel having lost her national character, she is not subject to the provisions of the statute in respect to recording sales and mortgages; and the mortgage is good against attaching creditors of the new owner who have levied upon her immediately on her arrival in a port of the United States, if neither party take the requisite steps to obtain a new registry. Registration is not compulsory upon the owner. It is a privilege and advantage which the law offers to him, but of which he may or may not avail himself as he chooses.³

525. A mortgage of a registered vessel need not be recorded in pursuance of any state statute, in order to give the mortgagee a preference over a subsequent purchaser or mortgagee, if it be duly recorded according to the statute of the United States in the office of the collector of the home port of the vessel. The statute of the United States excludes all state legislation upon the subject, whether such legislation be prior or subsequent to the United States statute. Thus, such a mortgage made in New York need not be filed and registered at the end of a year according to the laws of that state. Such filing and refiling have no effect whatever upon the security.⁴

¹ *D'Wolf v. Harris*, 4 Mason, 515; *Winsor v. McLellan*, 2 Story, 492; *ing S. C.* 26 N. Y. 92, and overruling in part *Thompson v. Van Vechten*, 5 Abb.

² R. S. § 4166; Act March 2, 1803, § 8.

³ *Davidson v. Gorham*, 6 Cal. 343.

⁴ *White's Bank v. Smith*, 7 Wall. 646; *Cunningham v. Tucker*, 14 Fla. 251; *Aldrich v. Ætna Co.* 8 Wall. 491, revers- *Wood v. Stockwell*, 55 Me. 76; *Shaw v.*

526. A record under a state law of a mortgage of a vessel not enrolled ceases to be effectual after enrolment.¹ "Before the vessel is registered or enrolled, a mortgage of it will be valid if recorded agreeably to the laws of the state. After it is registered or enrolled, a mortgage of it will not be valid unless recorded as required by the laws of the United States. To hold otherwise would go far to defeat the very object which the registry laws of the United States were intended to secure."²

But while this seems to be the more reasonable interpretation of the registry laws of the United States, a different construction was adopted in Indiana, where it was held, that if before a vessel is registered or enrolled as a vessel of the United States a mortgage thereof is executed and duly recorded according to the law of the state where such vessel is, the mortgage will be valid against one purchasing for value and without actual notice, after the vessel has been enrolled in the office of the surveyor of a port, although the mortgage has not been recorded in that office.³

527. As between the parties and as against persons having actual notice, a mortgage of a vessel is good without acknowledgment and record.⁴

McCandless, 36 Miss. 296; Fontaine v. Beers, 19 Ala. 722; Robinson v. Rice, 3 Mich. 235; The Grace Greenwood, 2 Biss. 131. For cases of registration according to state laws prior to the Act of 1850 see Beaumont v. Yeatman, 8 Humph. (Tenn.) 542.

"Previous to this Act of 1850, providing for the recording of bills of sale and mortgages of vessels, they were required to be filed by the laws of many of the states in the clerk's office, or some place of public deposit in the town or city where the vendor or mortgagor resided, in order to protect the interest of the vendee or mortgagee against subsequent *bonâ fide* purchasers or mortgagees. And this practice continued in many places after the passage of the Act of 1850, for abundant caution, on account of a doubt as to the effect that would or might be given to it as a recording act from the very imperfect

provisions of the law. There can be no doubt, however, but that the system of recording these instruments in the collector's office, at the home port of the vessel, furnishes a much readier opportunity, to persons dealing in this species of property, to obtain a knowledge of the condition of the title, than by the former mode under the state law." White's Bank v. Smith, 7 Wall. 646, per Nelson, J.

¹ Perkins v. Emerson, 59 Me. 319.

² Perkins v. Emerson, *supra*, per Walton, J.

³ Stinson v. Minor, 34 Ind. 89.

⁴ Moore v. Simonds, 100 U. S. 145; S. C. 19 Am. L. Reg. 394; Best v. Staple, 61 N. Y. 71; The John T. Moore, 3 Woods, 61; Cape Fear Steamboat Co. v. Connor, 3 Rich. (S. C.) 335; Hobbs v. The Interchange, 1 W. Va. 57; Merrick v. Avery, 14 Ark. 370; Parker Mills v. Jacot, 8 Bosw. N. Y. 161. See § 312.

528. One holding the absolute legal title to a vessel, though he be a mere agent or trustee for others, may make a valid mortgage to one who takes it in good faith and without notice, express or implied, that the making of it was an act outside of the authority of the apparent owner.¹ If the nominal owner of a vessel execute a mortgage upon a vessel, the title of which is in his name, to secure money loaned to the real owner, for the benefit of the vessel, he is not personally liable for the debt, unless the mortgage contains a covenant on his part to pay, or he gives some other personal obligation for the debt.²

If the owner of a vessel, after having given a bill of sale in the nature of a mortgage, be allowed to remain in possession and act as absolute owner without any change of her register, and he afterwards sells or mortgages the vessel, or gives a bottomry bond, to one who has no notice of the mortgage, the lien of the latter will be preferred to the mortgage.³

529. A bill of sale of a vessel absolute in its terms, like such a bill of sale of any other chattels, may be shown by parol evidence to be only a mortgage.⁴ Evidence that the bill of sale was recorded; that the vessel was reënrolled in the name of the assignee; that a policy of insurance was taken out in his name as owner, and that no note or bond was taken by him, is insufficient to overcome positive evidence that the bill was taken as a mere security for a loan.⁵

530. *Equitable Mortgages.*—A bond which is insufficient as a bottomry bond may be good as a mortgage, if it be duly recorded as such.⁶

An indorsement on a ship's register at the time of sale, that "the vessel should not be sold until the notes given for the purchase money are paid," constitutes an equitable mortgage, especially if the ship's register be left with the vendor.⁷

¹ *Atherton v. Phoenix Ins. Co.* 109 Mass. 32.

² *Jenkins v. Wheeler*, 2 Abb. (N. Y.) App. Dec. 445. See *Richards v. Stephenson*, 57 Me. 51.

³ *The Mary*, 1 Paine, 671; *The Romp*, Olcott's Adm. 196.

⁴ *Morgan v. Shinn*, 15 Wall. 105. See

Gould v. Stanton, 16 Conn. 12: questionable law.

⁵ *Morgan v. Shinn*, *supra*.

⁶ *Greely v. Smith*, 3 Woodb. & M. 236. See *Webb v. Walker*, 7 Cush. (Mass.) 46.

⁷ *Welsh v. Usher*, 2 Hill (S. C.) Ch. 167.

A deposit of a bill of sale of a vessel with a power of attorney to sell her, as security for advances of purchase money, does not constitute a legal though it may be an equitable mortgage. The creditor takes only a naked power of sale without any present conveyance of the property in mortgage or pledge.¹ But if one advances the purchase money and takes the bill of sale in his own name as security, he is a mortgagee.²

531. Secondary evidence may be given of a lost mortgage. Thus the testimony of the owner of a vessel, after the decease of the mortgagee, that on a certain day he mortgaged her to such mortgagee for a particular sum, together with a memorandum upon her register of such mortgage, are competent to prove that there was a mortgage of the vessel, and, in connection with testimony of the executor of the mortgagee that on a careful search he cannot find the original instrument among the testator's papers, to prove the contents of the mortgage.³

II. *Priority as between Mortgages and Liens.*

532. A mortgage, though duly recorded, is inferior to any strictly maritime lien.⁴ It is also inferior to a valid bottomry bond, whether this be given before or after the mortgage. Such bond is a contract of an extraordinary kind, whereby the master under circumstances of positive emergency, or of the highest degree of expediency, his own credit and that of the owners being of no avail, borrows money on the keel or bottom of the ship, to enable him to prosecute and continue the voyage, and engages to repay upon the safe arrival of the ship at its port of destination. This contract confers a right which can be enforced against the ship only. It does not transfer the title to the property, as does a mortgage; neither does it confer the right of possession, as does a pledge; but it more resembles a lien which can be enforced against the *res*, the chattel itself.

The wages of the last voyage of a vessel have precedence of all earlier liens and incumbrances, when these exceed her full value;

¹ The *Perseverance*, Blatchf. & H. Adm. 385.

² The *Panama*, Olcott's Adm. 343.

³ *Atherton v. Phoenix Ins. Co.* 109 Mass. 32.

⁴ *Baldwin v. The Bradish Johnson*, 3 Woods, 582; *The Mary Ann*, L. R. 1 Adm. & E. 8; *The Feronia*, L. R. 2 Adm. & E. 65; *The De Smet*, 10 Fed. Rep. 483, and *note*; *Jones on Liens*, § 1775

and in such case one who pays the wages may be subrogated to the rank of the seamen, on the ground that he has saved expense. A part owner may have such subrogation as against the mortgagee of the share of another part owner.¹

Seamen's wages are an equal lien on the ship and on the freight. When, therefore, there was a fund in an admiralty court arising from the sale of a mortgaged vessel, and the freight money had been attached by process issuing out of a state court against the owner after the making of the mortgage, the former court held that the mortgagee was entitled to have the seamen first paid out of the freight so far as that would go; for the attaching creditor, having parted with no value for his lien on the freight, acquired it subject to an equity then existing as between the mortgagee of the vessel and the owner, to have the fund marshalled for the benefit of the mortgagee.² But in a case where a similar question arose between a mortgagee and a party who had a lien on the freight by way of security for advances, it was directed that the seamen be paid *pro rata* out of the vessel and the freight, for the parties had equal equities, each having paid value for his interest at the time of acquiring it, and therefore were entitled to equal protection.³

Liens for necessary repairs or supplies contracted for by the master in a foreign port have priority of a recorded mortgage.⁴ But material-men who furnish repairs and supplies to a vessel in her home port do not acquire a maritime lien upon a vessel.⁵ If any such lien exists it is one provided by statute; and it is a question upon which the courts are divided whether such a lien has priority of a duly recorded mortgage.

533. Liens for advances made in a foreign port to pay for necessary repairs and supplies have priority over existing mortgages to creditors at home. Such advances being for the security and protection of the vessel, they are for the benefit of the mortgagees as well as of the owners.⁶ "It is not necessary to the

¹ The *J. A. Brown*, 2 Lowell, 464.

⁴ *Fox v. Holt*, 36 Conn. 558.

² The *Olivia A. Carrigan* (D. C. N. Y. 1882), 7 Fed. Rep. 507. See, also, The *Sailor Prince*, 1 Ben. 234, 261; The *Brig Wexford* (D. C. N. Y. 1881), 7 Fed. Rep. 674.

⁵ The *Lottawanna*, 21 Wall. 558; *Baldwin v. The Bradish Johnson*, 3 Woods, 582; The *Red Wing*, 14 Fed. Rep. 869. See §§ 536-539.

³ *In re Bank of Nova Scotia* (D. C. N. Y. 1880), 4 Fed. Rep. 667.

⁶ The *Emily Souder*, 17 Wall. 666; The *Acme*, 2 Ben. 386; *S. C. 7 Blatchf.* 366; *Jones on Liens*, § 1794.

existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account. The presumption arises that such is the fact from the necessities of the vessel, and the position of the parties considered with reference to the motives which generally govern the conduct of individuals. Moneys are not usually loaned to strangers, residents of distant and foreign countries, without security, and it would be a violent presumption to suppose that any such course was adopted when ample security in the vessel was lying before the parties. The presumption, therefore, that advances in such cases are made upon the credit of the vessel is not repelled by any loose and uncertain testimony as to the suppositions or understandings of one of the parties. It can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry.”¹ The fact that the person making the advances makes drafts therefor upon the owner does not deprive him of his lien on the vessel.²

534. A mortgage is subordinate to the ordinary obligations to which a master may subject the vessel by his contracts. The master is *pro hac vice* the agent of the mortgagee. Thus, if the mortgagee allows the mortgagor to use a vessel in the general freighting business, and a part of the freight be feloniously abstracted from the cargo with the knowledge and assent of the master, and the vessel be libelled by the consignee to recover the value of the goods not delivered, the mortgagee cannot successfully interpose his prior mortgage; but the vessel is liable for the goods feloniously abstracted.³

535. A mortgagor who is allowed to remain in possession of a vessel has an implied authority to create liens for repairs,

¹ The Emily Souder, 17 Wall. 666, per Field, J.

³ The E. M. McChesney, 8 Ben. 150; affirmed, 15 Blatchf. 183, per Waite, Ch. J.

² The Acme, 7 Blatchf. 366.

which will take priority of the mortgage.¹ The mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose.² It is but reasonable to infer in such case that the mortgagor had authority to cause repairs to be made upon the usual and ordinary terms; and these terms are that the shipwright shall have a lien for the work done and the labor expended upon the vessel.

This rule has been applied not only in case of vessels navigating the ocean, but as well in case of a canal boat. In such case the shipwright is allowed to retain possession as security for repairs made at the request of the mortgagor, or of one standing in his place as owner.³

But there is no maritime lien in favor of a shipwright, and therefore he has no lien unless he retains actual possession.⁴

536. It is competent for a state to determine the rank of liens upon domestic vessels;⁵ and courts of admiralty will enforce liens given by the local law, by process *in rem*, where the cause of action is maritime in its nature, and where the claim is not maritime will recognize the lien in the distribution of proceeds in the registry of the court. Courts of admiralty enforce

¹ Williams v. Allsup, 10 C. B. N. S. 417; Scott v. Delahunt, 65 N. Y. 128; S. C. 5 Lans. 372; The De Smet, 10 Fed. Rep. 483, 494, note. See § 474; Jones on Liens, § 1793.

² Williams v. Allsup, 10 C. B. N. S. 417; S. C. 30 L. J. (C. P.) 353, 355, per Erle, C. J. In the same case Mr. Justice Willes said: "The mortgagor is permitted by the mortgagees to remain in possession of the vessel for the purpose of using it in the ordinary way, and he cannot use it in the ordinary way unless it is repaired. That seems to me to involve the permission of the mortgagees to get the vessel repaired upon the ordinary terms, though not to pledge the mortgagee's credit. Then, the shipwright who does the repairs is entitled to his lien as incidental to his employment." See, also, The Can-

ada, 7 Sawyer, 173; S. C. 7 Fed. Rep. 248.

³ Scott v. Delahunt, 65 N. Y. 128.

⁴ The Two Ellens, 4 L. R. P. C. 161; S. C. 3 L. R. Adm. & E. 345, 358.

⁵ The Granite State, 1 Sprague, 277; The Wm. T. Graves, 14 Blatchf. 189; Thorsen v. The J. B. Martin, 26 Wis. 488; The City of Tawas (Dist. Mich. 1880), 3 Fed. Rep. 170; The Harrison (Dist. of Cal.), 2 Abb. (U. S.) 74; The De Smet, 10 Fed. Rep. 483, and note, 489; The Red Wing, 14 Fed. Rep. 869; The Canada, 7 Sawyer, 173; S. C. 7 Fed. Rep. 730; The Island City, 1 Lowell, 375; The John Farron, 14 Blatchf. 24; The St. Joseph, 1 Brown Adm. 202; The Alice Getty, 2 Flipp. 18; The Illinois White & Cheek, 2 Flipp. 383. See § 539; Jones on Liens, § 1724.

such liens upon two grounds: 1. That a lien of a maritime contract, whether it arises under the local law or the maritime law, is practically a maritime lien and entitled to rank accordingly, and to be preferred to that of a mortgage. 2. That a mortgagor in possession is the agent of the mortgagee, and that the lien which attaches to the mortgagor's contracts binds not only his interest but that of his principal.¹ In enforcing such liens, courts of admiralty are governed by the terms of the statutes creating the liens, and not by the general doctrines of maritime law.²

Therefore, where a statute of a state confers a lien for repairs upon a vessel, and in terms gives such lien preference of all other liens, except that for seamen's wages, a court of admiralty will enforce such lien against a prior mortgagee, and against the title acquired by a purchaser under a foreclosure of the mortgage.³

¹ The Canada, 7 Sawyer, 173.

² The Wm T. Graves, 14 Blatchf 189; Weaver v. The S. G. Owens, 1 Wall. Jr. 359.

Liens depending upon state laws, under the 12th rule of the admiralty, as amended in 1859, are left to be dealt with by the state tribunals. This rule takes from the district courts the right of proceeding *in rem* for supplies and repairs, for which a state statute gives a lien. Maguire v. Card, 21 How. 248. Otherwise under new rule of 1872. The Circassian, 11 Blatchf. 472.

The United States statute, R. S. § 4192, relative to recording of mortgages of vessels, gives no lien or priority to mortgages other than that which they had before the act was passed, except that recorded mortgages are given priority in certain cases over mortgages not recorded. "It affects mortgages and conveyances of ships as the various registry acts of the states affect conveyances and mortgages of lands and chattels. In other words, it gives no new rights; it preserves rights already acquired. It is a law that requires owners and mortgagees of ships to advertise their claims; to give notice to all the world of their demands; but in a conflict of rights the owner must stand on his conveyance, the mortgagee on his mortgage. And, as prior to this recording law, liens, whether maritime or domestic, under the maritime law or under the state law, had priority

over mortgages, so now they have priority." Per Pardee, Circuit Judge, The De Smet (E. D. La. 1881), 10 Fed. Rep. 483. And see The Canada, 7 Sawyer, 173; S. C. 7 Fed. Rep. 730; The Favorite, 3 Sawyer, 405, 409.

³ The Wm. T. Graves, *supra*. Judge Wallace, rendering a decision of the District Court of the United States to this effect, which was affirmed by the Circuit Court, said: "The legislation does not trench upon any of the rules of the admiralty regulating priorities between liens, because neither of the liens involved are maritime liens. As to other liens, in dealing with questions of priority, courts of admiralty are governed by equitable principles. . . . But it is a controlling rule in admiralty, that priority between claims depends not upon precedence in date, but upon the favor due to the nature of the claim; priority in time must yield to priority in rank; the claim of the materialman must give way to that of the seaman, and both to that of the salvor; and, as between holders of bottomry bonds, the last in point of date is entitled to priority of payment; because the last loan furnished the means of preserving the ship, and without it the former lenders would have entirely lost their security. Applying this rule in determining the question of priority between a mortgage and a

In some states a lien is given for labor and material used in the construction or repair of a vessel, and for supplies furnished her, in preference to all other liens except mariners' wages.¹ This lien is preferred to a prior mortgage, and may be enforced after the mortgagee has taken possession.²

Liens for labor performed and materials used in the construction or repairing of a vessel have priority of a mortgage when such priority is given by a state statute, whether the mortgage be recorded under state laws before the vessel is registered as a vessel of the United States, or it be recorded under the laws of the United States.³

claim for repairs, it seems very clear that the latter should be regarded with the highest favor, and should outrank the mortgage. . . .

"It remains to inquire whether the lien given by the state law contravenes any legislation of Congress concerning ships and vessels. . . . The only statute of Congress bearing upon the present question is that by which mortgages on vessels are required to be recorded in the office of the collector of customs where the vessel is registered or enrolled, in order to be valid as against any person having no notice of the mortgage. It has been held that by force of this statute a mortgage is valid, notwithstanding state legislation which requires additional formalities calculated to give notice to creditors or subsequent purchasers. *Aldrich v. Ætna Co.* 8 Wall. 491. It has been argued that the states can pass no laws which can affect the validity of mortgages so recorded. That Congress could invest mortgages on vessels with such invulnerability is probably true, but no such intent can fairly be implied from the language of the act. It is a registration act, and as such excludes all state legislation upon the same subject; and this was the only point decided by the Supreme Court in *Aldrich v. Ætna Company*. It has been held that liens given by the laws of a state for supplies furnished a domestic vessel take preference over a mortgage subsequently recorded. *The Harrison*, 2 Abb. (U. S.) 74. This conclusion of ne-

cessity involved the proposition that the states are competent to create liens which will take preference to the lien of a mortgage recorded pursuant to the act of Congress; and I see no reason to doubt their competency to determine the conditions of priority, so long as they do not infringe upon the legislation of Congress by imposing additional requisites in the recording of mortgages."

¹ G. S. ch. 151, § 12. For such statutes, see *Jones on Liens*, §§ 1721-1767.

² *Massachusetts*: *The Granite State*, 1 Sprague, 277; *Donnell v. The Starlight*, 103 Mass. 227.

Under a contract to furnish labor and materials for several vessels for a gross sum, no lien can be enforced upon one of them. Neither can such lien be maintained if the original contract by agreement of the parties to it be destroyed after the work is done, and a new contract applicable to one vessel only be made and antedated as of the time of the original contract. *Jones v. Keen*, 115 Mass. 170. The giving of notes by the builder of a ship to a person who has furnished materials used in her construction, merely for his accommodation, and not to be credited on the bill, is not payment for the materials, and does not prevent the enforcing of a lien for them. *Jones v. Keen*, *supra*; and see *The Napoleon*, 7 Biss. 393; *Merrick v. Avery*, 14 Ark. 370.

³ *Jones v. Keen*, *supra*; *The Norfolk & Union*, 2 Hughes, 123; *Hatton v. The Melita*, 3 Hughes, 494; *Reeder v. The*

537. The state courts have jurisdiction to enforce a lien created by its laws for supplies furnished, or repairs done, to a vessel within such state.¹ If the owner, who has exclusive possession and control of her, resides at the port where the supplies were furnished, or the repairs were made, it does not matter that the vessel is registered in the port of another state in the name of the mortgagee residing there.

538. A domestic vessel, within the meaning of the statutes of a state giving liens thereon for repairs and supplies, is one whose home port is within such state. A vessel owned in a port of any other state is a foreign vessel, and would be liable for repairs made, or for necessities supplied, under the general maritime law of the United States.² Thus, if a vessel be leased by a merchant in Philadelphia from a merchant in Baltimore, and it be furnished and equipped by the lessee in the former port, it would not be considered a foreign vessel by those who dealt with the lessee in that port, although the legal title and general ownership still remained in the lessor. For the purpose of any liens under the laws of Pennsylvania, Philadelphia would be considered the home port of the vessel.

539. But by other decisions a recorded mortgage has precedence of a lien founded upon a state statute, and not strictly

George's Creek, 3 Hughes, 584; The Hiawatha, 5 Sawyer, 160; The Wm. T. Graves, 8 Benedict, 568; The Granite State, 1 Sprague, 277; Jones on Liens, § 1795.

¹ Maguire v. Card, 21 How. 248, 250; Donnell v. The Starlight, 103 Mass. 227; Foster v. The Richard Busteed, 100 Mass. 409; McMonagle v. Nolan, 98 Mass. 320; and see Thorsen v. The J. B. Martin, 26 Wis. 488; Jones on Liens, § 1724.

² Weaver v. The S. G. Owens, 1 Wall. Jr. 359; *Ex parte* Easton, 95 U. S. 68; The Albany, 4 Dill. 439; Jones on Liens, §§ 1679-1692.

In Weaver v. The S. G. Owens, *supra*, Grier, J. said: "The enrolment of a vessel is for the purpose of establishing her national character, and to give her the privileges of an American vessel. In a

question of ownership *inter partes*, it is but *prima facie* evidence of title in the person in whose name she is registered, and liable to be rebutted by proof of actual ownership in another, whether temporary or absolute, as lessee or vendee. . . . The formal bill of sale reciting the registry may be necessary for the purpose of enrolment, but as between the parties and those who deal with the vessel, and where the national character is not in dispute, the person rightfully in possession, navigating the vessel for his own use and profit by officers and mariners appointed and employed by himself, will be considered the special owner, whether he be lessee, mortgagee, or parol vendee, notwithstanding some other person may be the registered owner, and have the so-called legal title or general ownership in himself."

maritime in character. In one case¹ it was declared that inasmuch as the admiralty jurisdiction conferred upon the district courts by the judiciary act is an exclusive jurisdiction,² a state statute cannot create, upon property that is subject exclusively to that jurisdiction, charges and incumbrances that in any way partake of the character and force of maritime liens, that shall be superior to other charges or incumbrances of an older date. Accordingly, it was held that while a lien for supplies and materials created by a state statute may be recognized and enforced in a court of bankruptcy, such lien could not, like a maritime lien, be made to relate back, and take priority over a mortgage recorded prior to the creation of such lien.

In another case a recorded mortgage was held to be entitled to preference to a lien created by a state statute for supplies and materials furnished at the home port, upon the ground that such a lien is not within the exception of the United States statute as to liens by bottomry.³ "This would seem to mean a maritime lien, and not a lien created solely by a law of one of the states. It was intended that in all such cases as are referred to in the proviso, the vessel should be bound independent of the mortgage; but as the lien in this case was not a maritime lien, it is not strictly within the terms of the proviso."⁴

An attachment of a vessel under the laws of a state cannot defeat a prior mortgage of it duly recorded under the laws of the United States,⁵ though the state statute provides that no mortgage of a vessel shall be valid, as against the interests of third persons, unless possession be delivered to, and retained by, the mortgagee, or the mortgage be recorded in the manner prescribed by the state statute.⁶

The cases are numerous which hold that a statutory lien for supplies and materials furnished in the home port is subordinate to a mortgage duly recorded. The legislation of Congress in regard to recording mortgages is within its constitutional authority, and it therefore overrides all state legislation upon the subject.

¹ Scott's case, 1 Abb. (U. S.) 336.

² The *Hine v. Trevor*, 4 Wall. 555; *Balard v. Wiltshire*, 28 Ind. 341; *Stewart v. Harry*, 3 Bush (Ky.), 438; *Griswold v. The Otter*, 12 Minn. 465; *The General Buell v. Long*, 18 Ohio St. 521; *In re The Josephine*, 39 N. Y. 19.

³ The *Kate Hinchman*, 7 Biss. 238.

⁴ Per Drummond, J., in *The Kate Hinchman*, *supra*.

⁵ *Howe v. Tefft*, 15 R. I. 477.

⁶ *Aldrich v. Ætna Co.* 8 Wall. 491. And see *White's Bank v. Smith*, 7 Wall. 646.

A state cannot by its legislation, create a lien upon a vessel which shall have priority over one already existing by virtue of an act of Congress.¹

539 *a*. A mortgagor of a ship left in possession by the mortgagee is impliedly authorized to make changes, additions, and repairs such as may be necessary and convenient for her preservation and use, provided he does not wilfully depreciate her value as a security to the mortgagee. In such case the old material, or the discarded tackle or furniture, may be disposed of by the mortgagor as his property, unaffected by the mortgage. But if the mortgagor does not dispose of it, but suffers it to remain on board as part of the ship's material, and it is capable of being used in some form in the navigation of the vessel, it would doubtless still be a part of it, and would still be subject to the lien of the mortgage.²

But if the old material, as such, is not suited for further use upon the vessel, the fact that the mortgagor allows it to remain on board during the voyage does not show that he did intend to withdraw it from the operation of the mortgage and appropriate it on arriving at a port where it could be advantageously disposed of. Thus, if a ship bound on a long voyage be recoppered at an intermediate port, and the old copper be stowed in her hold and brought into the port of her destination, inasmuch as the old copper cannot be again used upon the ship, and has been replaced by new copper, which has added to the mortgagee's security, the old copper will be regarded as separated from the ship and withdrawn from the operation of the mortgage, although the mortgagee take

¹ *Baldwin v. The Bradish Johnson*, 3 Woods, 582; *The John T. Moore*, 3 Woods, 61; *The De Smet* (E. D. La. 1881), 10 Fed. Rep. 483; *The Kate Hinchman*, 7 Biss. 238; *The Skylark*, 2 Biss. 251; *The Lady Franklin*, 2 Biss. 121; *The Grace Greenwood*, 2 Biss. 131; *The Great West No. 2 v. Oberndorf*, 57 Ill. 168; *The Hilton v. Miller*, 62 Ill. 230; *Merrick v. Avery*, 14 Ark. 370; *Brazee v. Lancaster Bank*, 14 Ohio, 318; *Holliday v. Franklin Bank*, 16 Ohio, 533. But see § 536; *Jones on Liens*, § 795.

² *The Canada*, 7 Sawyer, 173. "For instance, if the mortgagor in possession should put a new suit of sails on the vessel, and instead of disposing of the old ones should stow them away as suitable material for mending or supplying a rent or lost sail, such old material would remain within operation of the mortgage, and pass to the mortgagee in possession." Per *Deady, J.* And see *Southworth v. Isham*, 3 Sandf. (N. Y.) 448; *Jones on Liens*, § 1793.

possession of the ship while the copper is still on board upon her arrival at the port of her destination.¹

III. *Rights and Liabilities of the Parties.*

540. A mortgagee in possession is personally liable for supplies furnished upon his credit, or procured by the master while acting as his agent. Such a mortgagee to whom supplies for the use of the vessel have been furnished, under such circumstances that he is liable for them, is properly described as owner in a declaration in an action to recover for the supplies.² Whatever be the subject matter of a mortgage the title vests in the mortgagee, and unless there be an agreement to the contrary the right of possession follows the right of property.

But the mere legal ownership conferred by a mortgage, though accompanied by possession, does not necessarily make the mortgagee liable for the ship's debts.³ The question in each case is, Were the repairs done or the goods supplied on the credit of the mortgagee or on the credit of the actual owner?

It is the right of a mortgagee in possession to pay out of the earnings of a vessel the cost of such repairs as are reasonably necessary to keep the vessel in good condition, though not for such as have been made necessary through his own neglect or mismanagement. The mortgagee may also pay and charge against the mortgagor claims for supplies and repairs incurred by the mortgagor which are liens upon the vessel.⁴

541. A mortgagee of a vessel not in possession is not personally liable as owner for supplies or repairs, although he holds a bill of sale of her absolute in terms, but intended only as collateral security for a debt, and the vessel is registered in his name.⁵

¹ *The Canada*, 7 Sawyer, 173.

² *Luce v. Hadley*, 119 Mass. 229.

³ *The Troubadour*, L. R. 1 Adm. & E. 302.

⁴ *Fick v. Runnels*, 48 Mich. 302.

⁵ *Myers v. Willis*, 17 C. B. 77; *S. C.* 18 C. B. 886; *Philips v. Ledley*, 1 Wash. 226; *Morgan v. Shinn*, 15 Wall. 105; *Dugan v. Pentz*, 2 Hughes, 66. **Massachusetts**: *Howard v. Odell*, 1 Allen, 85; *Rice v. Cobb*, 9 Cush. 302. **Maine**: *Wood v.*

Stockwell, 55 Me. 76; *Cutler v. Thurlo*, 20 Me. 213; *Winslow v. Tarbox*, 18 Me. 132. **New York**: *Ring v. Franklin*, 2 Hall, 1; *Macy v. Wheeler*, 30 N. Y. 231; *Birkbeck v. Tucker*, 2 Hall, 121; *Weber v. Sampson*, 6 Duer, 358; *M'Intyre v. Scott*, 8 Johns. 159; *Hesketh v. Stevens*, 7 Barb. 488; *Thorn v. Hicks*, 7 Cow. 697; *Champlin v. Butler*, 18 Johns. 169; *Miln v. Spinola*, 4 Hill, 177; *S. C.* 6 Ib. 218; *Bryan v. Bowles*, 1 Daly, 171; *Delano v. Wright*,

542. A mortgagee by an absolute bill of sale of an undivided share of a vessel who has never taken possession, nor received any part of her earnings, nor in any way interfered in her management, is not personally liable for supplies ordered by the master, although they were for her permanent advantage. In this respect, the mortgagee of a vessel stands on the same ground as the mortgagee of any other species of property. It is not a ques-

1 Robt. 298; *Weston v. Wright*, 1 Robt. 312; *Baxter v. Wallace*, 1 Daly, 303; *S. C.* 24 How. Pr. 484. **Pennsylvania**: *Duff v. Bayard*, 4 W. & S. 240. **New Hampshire**: *Lord v. Ferguson*, 9 N. H. 380. **Connecticut**: *Fox v. Holt*, 36 Conn. 558. **South Carolina**: *Jones v. Blum*, 2 Rich. 475; *Qordray v. Mordecai*, Ib. 518.

Chief Justice Bigelow, delivering the decision of the Supreme Court of Massachusetts to this effect in the case of *Howard v. Odell*, said: "The real question in all such cases is, with whom was the contract made, and was the person who made it authorized to bind the mortgagee? If the mortgagee was not in possession of the vessel and did not receive the benefit of her earnings, or exercise any control over her, but only held his title as collateral security for his debt, then it is very clear that neither the master nor the mortgagee could claim to act as his agent, or bind him by their contracts. In such case there is no authority, either express or implied, by which they can undertake to act in his behalf. Doubtless the mortgagee may by his acts hold himself out as the real owner of the vessel in such way as to lead persons to believe that the master or mortgagor is his agent, authorized to make contracts concerning the vessel. He would then be bound by them, under the ordinary rule of law regulating the relation of principal and agent. Such was the case in *Tucker v. Buffington*, 15 Mass. 477, where the mortgagees not only had the enrolment of the vessel taken out in their names as owners, but also substituted Boston, their own place of residence, on the stern of the vessel, instead of Portland, where the mortgagors resided.

The court, in stating their reasons for holding the mortgagees liable in that case, give great weight to this circumstance. But this court has since decided in *Brooks v. Bondsey*, 17 Pick. 441, that a mortgagee of a vessel is not liable for supplies if the vessel is not in his possession or employment, although she was enrolled in his name as absolute owner. Indeed, it would be giving altogether too much weight to the registry and enrolment of vessels to hold that persons whose names appeared therein as owners were thereby made liable for repairs and supplies. Every one conversant with shipping and commercial dealings knows that vessels are often employed under charter-parties, by which even the real owners are exempted from all charges incurred in their management and navigation. Whenever the charterer is by the terms of his contract deemed to be owner *pro hac vice*, no liability for supplies or repairs attaches to the actual owner of the vessel in whom the legal title is vested. It is therefore well understood among all persons engaged in the business of making repairs or furnishing supplies, that their right to recover payment therefor does not depend on the registry or enrolment, but on the right and authority of the person with whom they deal to act as agent for the owners and to bind them by his contracts. The real transaction between the parties is to be looked at, in order to ascertain whether that which appears by the registry to be a legal title in a particular person is or is not such an ownership as will authorize the person making the contract to act as agent."

tion of maritime lien, but of personal credit.¹ The master has no power to pledge the latter, any more than a mortgagor of any other kind of property, or his agent, has to pledge the credit of a mortgagee not in possession for repairs or improvements made upon it.

But if a mortgagee of part of a vessel not in possession, and not originally liable for supplies furnished her, orally promises to pay for them if the creditor will not attach the interest of the other part owners, he is not bound by the promise, it being within the statute of frauds.²

543. Wages of master. — A mortgagee in possession is liable to the master for his wages, if the voyage be performed for the benefit of the mortgagee. But if the master make a special agreement as to his wages with the real owner or mortgagor, with full knowledge of the conveyance to the mortgagee, he cannot waive his special agreement and sue the mortgagee as owner.³

If a mortgagee suffers the owner to remain in possession of the vessel and to employ a master, the latter has a lien for his wages superior to the mortgage lien.⁴

544. A mortgagee of a vessel has the right of immediate possession unless restrained by agreement. He has the same right of possession that belongs to a mortgagee of any other personal chattel.⁵ Being entitled to possession, he may maintain replevin against an officer who has attached the vessel as the property of the mortgagor.⁶ If he has actual possession he may use all the remedies that a legal owner has, and one of these is the right to file a libel *in rem* for earnings from towage.⁷

A purchaser of a part of a vessel from the mortgagor is liable in trover to the mortgagee for a conversion of it if he refuses to surrender it upon demand, although he be not in possession except through the agency of the master. But his voluntary participation in the earnings of the vessel, before and after the demand, is

¹ *Blanchard v. Fearing*, 4 Allen (Mass.), 118. See §§ 472-480.

² *Ames v. Foster*, 106 Mass. 400.

³ *Champlin v. Butler*, 18 Johns. (N. Y.) 169; *Fisher v. Willing*, 8 S. & R. (Pa.) 118.

⁴ *The Brig Wexford*, 7 Fed. Rep. 674.

⁵ *Foster v. Perkins*, 42 Me. 168.

⁶ *Esson v. Tarbell*, 9 Cush. (Mass.) 407.

⁷ *Kearney v. A Pile-Driver* (Dist. of N. J. 1880), 3 Fed. Rep. 246.

an assertion of his title, and an acknowledgment of the authority of the master to manage the vessel as his agent.¹

545. A mortgagee has no lien upon the earnings of a vessel which he allows to remain in the mortgagor's possession and use; and he cannot compel a specific appropriation of them to the payment of the debt.² If he has the right of immediate possession, he has a right to receive all the earnings of the ship, whenever he thinks fit to enter into possession; and if the ship has earned money he has a right, before the goods are delivered in respect of which the money is earned, to give notice to the consignee, or to the charterer, that he is a mortgagee, and that he requires the freight to be paid to him.³ The freight to be earned passes to the mortgagee by the mortgage, unless the mortgagor is entitled to the possession by agreement. To enable the mortgagee to establish his right to the freight, it is necessary that he should do some act asserting his right of possession; but as soon as he does any act to show that the mortgagor is not his agent, he is immediately entitled to have the freight paid to him.⁴ The mortgagee must in effect, however, take possession before he can claim the freight or charter hire from the mortgagor. He has no absolute right to the freight as an incident to the mortgage; and he cannot intercept the freight without taking actual or constructive possession of the ship.⁵

546. A mortgagee of a ship is entitled to the freight afterwards earned in preference to an assignee of the freight. Thus, where the owner of a ship assigned the freight not yet earned, and three days afterwards, with the knowledge of the assignee, mortgaged the ship, and the mortgage was duly registered, and the assignee neglected to give notice of his claim upon the freight to the mortgagee, it was held that the assignee could not set up any right to the freight after it was earned in opposition to the claim of the mortgagee.⁶

¹ Wood v. Stockwell, 55 Me. 76.

² Tenney v. State Bank, 20 Wis. 152; The Brig Wexford (D. C. N. Y. 1881), 7 Fed. Rep. 674.

³ Wilson v. Wilson, L. R. 14 Eq. 32; Brown v. Tanner, L. R. 3 Ch. App. 597; Rusden v. Pope, L. R. 3 Ex. 269.

⁴ Kerswill v. Bishop, 2 Crompt. & J. 529.

⁵ Liverpool Marine Credit Co. v. Wilson, L. R. 7 Ch. App. 507. See this case, also, as to the position of a second mortgagee with respect to freight.

⁶ Wilson v. Wilson, L. R. 14 Eq. 32, 43. "It appears to me," said Vice-Chancellor

547. The hand that takes the freight must pay the wages. If the mortgagee takes possession and claims the freight he must pay the wages. On the other hand, if the mortgagee allows the mortgagor to remain in possession, he may be supposed to allow the mortgagor to enter into all engagements for the proper employment of the ship; and the mortgagor may remain in possession until the ship arrives at her destination in order to fulfil engagements actually incurred before notice of the mortgagee's claim to possession. If the mortgagor receives the freight he must deliver up the ship free from any charge in respect of wages.¹

548. The owner of a ship which is mortgaged may charter her before the mortgagee takes possession, and the mortgagee cannot interfere to prevent the execution of the charter-party unless it will materially injure or impair the value of his security; and if he does so interfere, the court will release her on the application of the charterer, unless such injury be shown by the mortgagee.²

549. A mortgagee by absolute bill of sale may maintain an action for a conversion of the vessel. Such bill of sale, intended by the parties as a mortgage, transfers the legal title with the right of maintaining an action against a wrong-doer for the conversion of the property. The holder of such a bill of sale may maintain an action for conversion of the vessel against a person claiming under a barratrous sale by the master; although on learning of the barratry he had abandoned her to the insur-

Malins, "perfectly clear that the mortgage of the ship, without notice of any assignment of the freight, carries with it the absolute right to receive the freight. It is in vain for the mortgagee of the freight, who has allowed the mortgage of the ship to take place without notice, to set up any claim; and it appears to me in this case the mortgagees have done all they possibly could. It is very true that the Master of the Rolls, in the case of *Lindsay v. Gibbs*, 22 Beav. 522, says that where there is a charter-party inquiries should be made and notice should be given. I am rather disposed to think that that is a dangerous

doctrine, because the mortgagee of a ship has a right to say, I am going to take the ship; I am going to realize my security; I know nothing of any one whatever besides, for nobody has given me any notice. I am rather disposed to think that if he takes a mortgage of a ship and registers it, he is not bound to make any further inquiries."

¹ *Johnson v. Royal Mail Steam Packet Co. L. R. 3 C. P. 38.*

² *The Fanchon*, 42 L. T. Rep. (N. S.) 483, Prob. & Adm. Div. Apr. 21, 1880; *S. C. 22 Alb. L. J. 77.*

ers, and received payment from them as on a total loss. The right to bring the action is a personal right of action, accruing to the owner at the time of the conversion. The measure of damages is the value of the property at that time, with interest thereon.¹

One who has taken a bill of sale of a vessel, absolute in form, but intended only as collateral security, and who has never taken the control or management of her, can recover on a policy insuring against "barratry of the master, unless the insured be owner of the vessel," although he has charged the premium to the real owner, if such charge has been without the owner's authority.²

IV. *Remedies for enforcing such Mortgages.*

550. There is no jurisdiction in admiralty to enforce a mortgage upon a ship where the mortgagee is out of possession, nor to enforce payment of freight to the mortgagee.³ A mortgage of a ship has nothing maritime in it. There is nothing in it analogous to those contracts which are the subject of admiralty jurisdiction. A failure to perform the condition of the mortgage cannot make it maritime.⁴

551. Upon default in a mortgage of a ship the legal title of the mortgagee becomes absolute just as in the case of a mortgage of other personal property. But while he is thereupon entitled to take possession of the property, he must apply it to the payment of the mortgage debt. As a general rule, to accom-

¹ Clark v. Wilson, 103 Mass. 219.

² Clark v. Washington Ins. Co. 100 Mass. 509.

³ Bogart v. The John Jay, 17 How. 399; Deely v. The Ernest & Alice, 2 Hughes, 70; Leland v. Ship Medora, 2 Woodb. & M. 92; Schuchardt v. Ship Angelique, 19 How. 239; The Lottawanna, 21 Wall. 558, 588; Britton v. The Venture, 21 Fed. Rep. 928; The Ella J. Slaymaker, 28 Fed. Rep. 767. Prior to the decision in Bogart v. The John Jay, *supra*, admiralty jurisdiction in such cases had been exercised in Massachusetts and Pennsylvania. See The Granite State, 1 Sprague, 277.

⁴ In Bogart v. The John Jay, *supra*, Wayne, J., said: "Courts of admiralty

have always taken the same view of a mortgage of a ship and of the remedies for the enforcement of them, that courts of chancery have done of such a mortgage and of any other mortgaged chattel. But from the organization of the former and their mode of proceeding, they cannot secure to the parties to such a mortgage the remedies and protection which they have in a court of chancery. They have, therefore, never taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title, or a right to the possession of a ship." In England by St. 3 & 4 Vict. ch. 65, a more ample jurisdiction in respect of mortgages of ships was given to the admiralty courts.

plish this he must resort either to a court of equity, or to statutory remedies when such exist, for foreclosure to bar the mortgagor's right of redemption.¹

A secret entry for possession amounts to nothing. Thus a part owner of a vessel mortgaged his interest in her while at sea, and after her return he mortgaged to another all his interest in the vessel, her appurtenances, outfits, cargo, and catchings, stating in this last mortgage that the hull was subject to the prior mortgage. The vessel was then, with the knowledge of the first mortgagee, fitted out by her owners for a whaling voyage. A few days before the vessel sailed, the first mortgagee took formal possession of her, when no one who was interested in her was on board, and he gave no notice to his mortgagor that he had done so. On the return of the vessel from that voyage her cargo was sold by the agent of her owners; and it was held that, as between the two mortgagees, the second mortgagee was entitled to the mortgagor's share of the proceeds, and might recover such share from the agent.² The secret entry was void and gave the mortgagee no rights. He might have taken and retained possession. He might then have insisted upon his right to coöperate in fitting out the vessel, and to participate in her earnings. But not having done so, and having allowed the mortgagor to fit her out, the mortgage of her earnings should take precedence.

552. One holding a mortgage of an entire vessel can enforce it without regard to any equities existing between the several mortgagors owning undivided parts of such vessel. The rule that is applied in the case of a mortgage of several parcels of land, that they shall be sold in such order as will best carry out the principles of equity, has no application. There is no instance where an entire parcel of land, mortgaged as such, has been sold in separate undivided shares. There would be no propriety in selling an undivided interest of a vessel which is covered by one mortgage.³

553. If a mortgaged vessel be sold under execution and the proceeds be brought into court, a mortgagee may apply by petition for the payment of his claim out of the proceeds.⁴ A

¹ *Bogart v. The John Jay*, 17 How. 399.

² *Dalrymple v. Sheehan*, 20 Mich. 224.

³ *Milton v. Mosher*, 7 Met. (Mass.) 244.

⁴ *Schuchardt v. The Angeliqne*, 19 How.

mortgage of a steamboat or other water craft, already subject to attachment under proceedings in a state court, does not withdraw such craft from the operation of the law authorizing such proceedings. Upon a sale to satisfy the judgment in the suit, the proceeds will be applied first to the satisfaction of the judgment, and the surplus to the mortgage. But it is to be observed that the mortgage in this case was executed and recorded under a state statute, prior to the present statute of the United States, which provides for the recording of mortgages of vessels in the office of the collector of customs in the district where the vessel is registered.¹

A vessel sold under a final decree in a proceeding *in rem* is sold free and clear of all incumbrances by mortgage or otherwise. By such sale incumbrances are transferred from the vessel to the proceeds. If the purchaser at such sale be the holder of a mortgage, this is not extinguished, but becomes a charge upon the proceeds, and the purchaser may, upon petition, obtain payment of the amount due upon the mortgage out of the proceeds.²

554. If the mortgagor fraudulently sell the entire property in a vessel without the mortgagee's assent, the latter may elect to enforce his right against the vessel, or he may waive the tort and follow in equity the proceeds of the sale in the form of the promissory notes taken by the mortgagor for the purchase money. The law imputes a trust in the mortgagor, and that trust follows the notes received by him.³

239. And see *The Acme*, 2 Ben. 386; *S.logg v. Brennan*, 14 Ohio, 72. See *Scott's case*, 1 Abb. (U. S.) 336.

¹ *Provost v. Wilcox*, 17 Ohio, 359; *Kel-*

² *In re Steamboat Syracuse*, 9 Ben. 348.

³ *McLarren v. Brewer*, 51 Me. 402.

CHAPTER XII.

ATTACHMENT AND EXECUTION.

I. Liability of the mortgagor's interest to attachment and execution, 555-565. II. Liability of the mortgagee's interest to attachment or execution, 566.	III. The statutory provisions and equitable rules in the several states, 567-600.
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I. Liability of the Mortgagor's Interest to Attachment and Execution.

555. At common law a chattel pawned or mortgaged was not liable to attachment in an action against the pawnor or mortgagor. A mere equitable interest could not be taken and sold on execution; for where there is no legal right there is no legal remedy. This was settled with great deliberation by the Court of King's Bench,¹ and is supported by all the common law authorities. It is only by statute that a creditor can reach such property at law.² Equities and rights to redeem are not subject to execution at common law, because where there is no legal right, and therefore no legal remedy,³ a creditor could reach such an interest of his debtor only by resorting to a court of equity, where he could be let in to redeem the incumbrance, unless, perhaps, he could first remove the incumbrance and then lay an attachment or levy an execution.

In many states, statutes have been enacted for the purpose of enabling creditors to reach, by attachment or execution, the rights

¹ *Scott v. Scholey*, 8 East, 467; *Metcalf v. Scholey*, 5 B. & P. 461.

² **Massachusetts**: *Badlam v. Tucker*, 1 Pick. 389; *Prout v. Root*, 116 Mass. 410, per Colt, J.; *Hunt v. Holton*, 13 Pick. 216; *Evans v. Warren*, 122 Mass. 303; *Cochrane v. Rich*, 142 Mass. 15. **Maine**: *Holbrook v. Baker*, 5 Me. 309; *Sawyer v. Mason*, 19 Me. 49; *Sargent v. Carr*, 12 Me. 396; *Deering v. Lord*, 45 Me. 293;

Melody v. Chandler, 12 Me. 282; *Barrows v. Turner*, 50 Me. 127; *Wolfe v. Dorr*, 24 Me. 104; *Smith v. Smith*, 24 Me. 555. **New Hampshire**: *Haven v. Low*, 2 N. H. 13, 16. **New York**: *Marsh v. Lawrence*, 4 Cow. 461. **Michigan**: *Bacon v. Kimmel*, 14 Mich. 201.

³ *Thornhill v. Gülmer*, 4 Sm. & M (Miss.) 153.

of their debtors to redeem their mortgaged chattels. Where such statutes exist, they afford the only means by which an attachment can be made, or an execution levied upon such equities of redemption.¹

556. But this rule has been changed in many states through the adoption of equitable principles, under which the mortgagor is regarded as the real owner of the property mortgaged, except as against the mortgagee; and now in these states the interest of a mortgagor in possession of chattels, and entitled to possession for a definite period, may be seized and sold on execution.² If the debt be payable on demand, and the mortgage provides that the mortgagor shall remain in possession until default in payment, there is no default until demand of payment is made, and consequently until that time the mortgagor has an interest subject to execution and sale.³

But generally it is only when the mortgagor has a certain right of possession for a definite period that an execution can be levied upon his interest. A mere equity of redemption, or a mere permissive possession, which the mortgagee may terminate at his pleasure, whenever he considers it necessary for his security, is not the subject of a levy and sale, except by virtue of some statute.⁴ After default, when the mortgagee or the trustee in a deed of trust has the right to take possession and sell, the mortgagor's interest cannot be levied upon, although only a portion of the

¹ *Evans v. Warren*, 122 Mass. 303.

² **New York:** *Hall v. Sampson*, 35 N. Y. 274; *Hull v. Carnley*, 11 N. Y. 501; *S. C.* 2 Duer, 99; *Mattison v. Baucus*, 1 N. Y. 295; *Randall v. Cook*, 17 Wend. 53; *Otis v. Wood*, 3 Wend. 498; *Fairbanks v. Bloomfield*, 5 Duer, 434; *Hamill v. Gillespie*, 48 N. Y. 556; *Gelhaar v. Ross*, 1 Hilt. 117. **Michigan:** *Nelson v. Ferris*, 30 Mich. 497. **New Jersey:** *Doughten v. Gray*, 10 N. J. Eq. 323. **Ohio:** *Curd v. Wunder*, 5 Ohio St. 92. **Alabama:** *M'Gregor v. Hall*, 3 St. & P. 397; *Williams v. Jones*, 2 Ala. 314; *Magee v. Carpenter*, 4 Ala. 469; *Harbinson v. Harrell*, 19 Ala. 753.

This is the rule in **New York**, § 592; **Iowa**, § 579; **Missouri**, § 587; **New Jersey**, § 591; **Ohio**, § 593; **Wisconsin**, § 600.

³ **New York:** *Livor v. Orser*, 5 Duer, 501; *Hull v. Carnley*, *supra*; *Wisser v. O'Brien*, 44 How. Pr. 209; *Newsam v. Finch*, 25 Barb. 176. But see *contra*, *Howland v. Willett*, 3 Sandf. 607; *Brown v. Cook*, 3 E. D. Smith, 123.

⁴ **Michigan:** *Tannahill v. Tuttle*, 3 Mich. 104; *Eggleston v. Mundy*, 4 Mich. 295; *Bacon v. Kimmel*, 14 Mich. 201. **Alabama:** *Hawkins v. May*, 12 Ala. 673; *Hopkins v. Scott*, 20 Ala. 179; *Perkins v. Mayfield*, 5 Port. 182.

demand is due, and the property greatly exceeds in value the amount then due and payable.¹

After forfeiture there is not left in the mortgagor such a possessory right or interest as is capable of being seized and sold under execution against him;² and the rule is the same although the mortgagor be allowed to remain in possession after the default,³ for in judgment of law he is in possession merely by sufferance, and as the bailee of the mortgagee.⁴ It does not matter that the value of the property greatly exceeds the amount of the debt secured; or that the sheriff leaves enough to satisfy the mortgage. He cannot levy after forfeiture.⁵

If the mortgaged goods be attached or be seized upon execution while they are in the mortgagor's possession, the mortgagee may, whenever entitled to possession by the terms of the mortgage, recover possession from the officer, just as he might recover possession of the mortgagor if he had retained possession;⁶ or may sue him for the conversion.⁷ He has his election of remedies.⁸

556 a. In other states a mortgagor's equity of redemption may be levied upon in the usual modes prescribed by statute, until such equity be foreclosed. Thus, if it be provided that mortgaged chattels may be levied upon and sold subject to the mortgage, and that the purchaser is entitled to possession upon complying with the conditions of the mortgage, the mortgagee takes his mortgage subject to this right in favor of the mortgagor's creditors, and this right may be exercised so long as the equity exists; and though the mortgagee may have possession, this may be temporarily interrupted for the purpose of a levy and sale under execution, subject to the mortgage.⁹

¹ *Thompson v. Thornton*, 21 Ala. 808; *Tannahill v. Tuttle*, 3 Mich. 104. Quoted with approval in *Peckinbaugh v. Quillin*, 12 Neb. 586; *S. C.* 12 N. W. Rep. 104, 105.

² *Eggleston v. Mundy*, 4 Mich. 295; *Baltes v. Ripp*, 3 Keyes (N. Y.), 210; *Baxter v. Gilbert*, 12 Abb. Pr. 97; *Norris v. Sowles*, 57 Vt. 360.

³ *Porter v. Parmly*, 34 N. Y. Superior Ct. 398; *S. C.* 43 How. Pr. 445.

⁴ *Stewart v. Slater*, 6 Duer (N. Y.), 83; *Champlin v. Johnson*, 39 Barb. (N. Y.)

606. Quoted with approval in *Peckinbaugh v. Quillin*, *supra*.

⁵ *Ford v. Williams*, 13 N. Y. 577.

⁶ *Saxton v. Williams*, 15 Wis. 292.

⁷ *Worthington v. Hanna*, 23 Mich. 530.

⁸ *Peckinbaugh v. Quillin*, *supra*.

⁹ As in *Indiana*: *Hackleman v. Goodwin*, 75 Ind. 202; *Sparks v. Compton*, 70 Ind. 393; *Emmons v. Hawn*, 75 Ind. 356; *Coe v. McBrown*, 22 Ind. 252; *Landers v. George*, 49 Ind. 309; *Olds v. Andrews*, 66 Ind. 147; *Raymond v. Parish*, 70 Ind. 256.

In Rhode Island it is provided that mortgaged goods when attached may be sold upon application of the parties to the suit, or of the mortgagee, and the proceeds applied first to the payment of the mortgage, and afterwards to the purposes of the attachment. In such case the property is liable to attachment so long as the mortgagor has a redeemable interest. The mortgagee, though in law entitled to possession, cannot, after a lawful attachment has been made, take the property by replevin from the attaching officer.¹

557. After a mortgagee has taken possession by virtue of a power in the mortgage authorizing him to do so if he deems himself unsafe, or for other reasons, the mortgagor has no longer any interest in the property which can be seized upon execution, although the debt be not due.² He has then no possessory right, but merely an equity of redemption, which is not the subject of seizure and sale on execution. Thus, if a mortgage be conditioned for the payment of a debt in one year, and the mortgagee take possession within that time under a provision allowing him to take immediate possession and sell under restrictions as to price, the mortgagor has afterwards no leviable interest in the property.³

The rule is otherwise in states whose statutes make the mortgagor's equity of redemption liable to execution so long as this right remains unforeclosed by the mortgagee.

After a mortgagee or trustee under a trust deed has reduced the mortgaged property to possession, it is no longer subject to be taken on execution against the mortgagor.⁴ The property cannot be taken from the mortgagee without first paying or tendering the amount of the mortgage debt.⁵

558. If the mortgage contain a provision that the mortgagee may take possession at any time when he deems himself insecure, his exercise of this right at once invalidates any attachment that may have been previously made while the prop-

¹ *Arnold v. Chapman*, 13 R. I. 586.

² *Nichols v. Mead*, 2 Lans. (N. Y.) 222; *S. C.* 47 N. Y. 653; *Mattison v. Baucus*, 1 N. Y. 295; *Galen v. Brown*, 22 N. Y. 37; *Hall v. Sampson*, 35 N. Y. 274; *Gelhaar v. Ross*, 1 Hilt. (N. Y.) 117; *Eggle-*

ston v. Mundy, 4 Mich. 295; *Eddy v. Kenney*, 5 Mont. 502.

³ *Nichols v. Mead*, *supra*.

⁴ *Palmer v. Forbes*, 23 Ill. 301; *Rayson v. Reid*, 55 Tex. 266.

⁵ *Worthington v. Hanna*, 23 Mich. 530.

erty was in the mortgagor's possession ; and the sheriff becomes liable in trespass if he does not surrender possession upon the mortgagee's demand.¹

559. A sale of all the right, title, and interest of a judgment debtor in chattels covered by a mortgage gives the purchaser all the interest of the debtor in the property that is vendible on execution, whether the mortgage be valid or void. The sale transfers not merely all the debtor's rights and remedies as against the mortgagee, but all the creditor's rights as well ; and the mortgage may be void as to the creditor when it would be valid against the debtor.²

A mortgagor who is rightfully in possession at the time when a wrongful attachment is made, may maintain an action against the attaching officer, although the attachment constitutes a breach of the condition of the mortgage.³

560. The officer making the seizure and sale is not liable to the mortgagee, although he sell the entire property generally, and deliver possession of it to the purchaser without in any way recognizing the lien of the mortgage,⁴ for such a sale conveys a title subject to the mortgage, if the mortgage be a valid one.⁵ It conveys the mortgagor's right of possession until the law day, and his equity of redemption.⁶

¹ Hall v. Sampson, 35 N. Y. 274, reversing S. C. 23 How. Pr. 84.

² Porter v. Parmley, 52 N. Y. 185.

³ Copp v. Williams, 135 Mass. 401.

⁴ Manning v. Monaghan, 28 N. Y. 585 ; Hull v. Carnley, 11 N. Y. 501, 506, Edwards, J., dissenting, overruling S. C. 2 Duer, 99 ; Hamill v. Gillespie, 48 N. Y. 556. And see Gassner v. Patterson, 23 Cal. 299. Brown v. Cook, 3 E. D. Smith, 123, is also in effect overruled on this point.

⁵ Manning v. Monaghan, *supra* ; Goulet v. Asseler, 22 N. Y. 225 ; Hamill v. Gillespie, *supra*.

⁶ O'Neal v. Wilson, 21 Ala. 288 ; Ament v. Greer (Kans.), 16 Pac. Rep. 102.

In Hull v. Carnley, *supra*, Judge Denio, delivering the judgment of the Court of

Appeals of New York to this effect, said : " The sheriff had a right to sell the interest of the mortgagor and to deliver the property to the purchaser, and the purchaser was warranted in taking it into his possession and in using it for the purposes to which it was adapted, until the day of payment ; and he had, moreover, a right to pay the mortgage debt, and thus extinguish the lien. Now, whether the sheriff assumed to sell the whole interest, ignoring the existence of the mortgage, or limited the sale to the mortgagor's interest, expressly recognizing the mortgage and selling subject to it, the rights of the purchaser and of the mortgagee would, in either case, be precisely the same. The mortgagee would not be deprived of his interest by a sale which did not recognize the mortgage, nor would the purchaser

561. But other courts hold the contrary doctrine, that a sale under execution of the entire property, instead of the mortgagor's interest, is an illegal act, for which the writ furnishes no justification.¹ Such act is in defiance of the mortgagee's rights, and is a trespass for which he may, if entitled to possession, maintain replevin or trespass against the officer.

The interest of the mortgagor may be sold on execution, but nothing more.² If the mortgage be a valid instrument and the purchaser has either actual or constructive notice of it, he acquires only an equity of redemption; but if the mortgage be fraudulent, and the purchase be made adversely to the claim of the mortgagee, the purchaser may contest the mortgage and acquire an unincumbered title.³

562. The creditor has no right to sell the mortgaged property in parcels, but must sell it together, so that when the mort-

under such a sale acquire anything more than the interest which was bound by the execution, to wit, the right of the mortgagor in possession, and the equity of redemption; and these would be the respective rights of the parties if the sale was limited in terms to the interest which could effectually be sold, that is, the title of the mortgagor. The effect of the sale on execution against the mortgagor would be the same as a voluntary transfer of the mortgaged articles by the mortgagor to a third person. Such a disposition of them would not oust the mortgagee, whether his interest was repudiated or was recognized. Such sales, whether judicial or private, pass such title as the vendor, or party against whom the title to sell exists, had to part with, and no other. The mortgagee, it is true, may be in a worse position, in some respects, by the property passing into other hands, for he must keep sight of it, so as to be able to find and take possession of it when his title shall become absolute by a default in payment. But he is not legally prejudiced, for the mortgagor may, when not restrained by the terms of the mortgage, remove it from place to place at his pleasure. He has

the same right to do so which a purchaser on execution against him has. I do not, therefore, see any reason why such a sale as was made in this case should be considered a conversion of the property, or a disturbance of the mortgagee's title. That title was not divested or interfered with, and there was no disposition of the *corpus* of the property which was not authorized by law. When the mortgagee's title became absolute he could claim his goods in the hands of the purchaser, or maintain an action if they should be withheld from him."

¹ *McConeghy v. McCaw*, 31 Ala. 447; *Frisbee v. Langworthy*, 11 Wis. 375; *Cotton v. Marsh*, 3 Wis. 221; *Cotton v. Watkins*, 6 Wis. 629; *Tannahill v. Tuttle*, 3 Mich. 104.

This would seem to be the better rule, especially if the officer assumes to sell the entire interest when he has notice of the mortgage.

² *Cotton v. Watkins*, *supra*; *White v. Cole*, 24 Wend. (N. Y.) 116; *Hamill v. Gillespie*, 48 N. Y. 556; *Rayson v. Reid*, 55 Tex. 266.

³ *White v. Cole*, *supra*.

gage falls due, the mortgagee may, if his debt be not paid, find the property and take possession of it.¹

563. When goods under attachment are mortgaged, and the mortgage is duly recorded, and notice of it given to the attaching officer, the property in the goods, subject to the lien created by attachment, passes to the mortgagee. If the officer sell the goods on mesne process, under authority of statute, and the plaintiff in the suit fail to maintain it, the proceeds of the sale, in the officer's hands, belong to the mortgagee. In a suit by the mortgagee against the officer for such proceeds, the latter cannot show in defence that he has received no money for the goods, nor any equivalent therefor.²

If the mortgaged property be seized under attachment against the mortgagor, before the registration of the mortgage, and is sold as perishable, the lien of the attachment prevails, of course, over that of the mortgage; but, if the mortgage is duly recorded before the rendition of judgment in the attachment suit, and the proceeds of sale exceed the amount of that judgment, the mortgagee may claim the surplus in the hands of the sheriff.³

If the mortgage was recorded before the attachment and the property is sold under the attachment as perishable, the mortgage attaches to the proceeds.⁴

564. If a mortgagee give an accountable receipt for the mortgaged property, when it is attached as the property of the mortgagor, he is precluded from setting up his own prior mortgage in defence to an action upon the receipt, and showing that the mortgage debt exceeds the value of the property.⁵

565. An attachment of the mortgaged property by the mortgagee for the mortgage debt is a waiver of his lien under the mortgage.⁶ A lien by attachment and a lien by mortgage upon the same property cannot coexist, for they are essentially

¹ *Manning v. Monaghan*, 1 Bosw. (N. Y.) 459. See § 600. See *Keith v. Haggart* (Dak.), 33 N. W. Rep. 465.

² *Appleton v. Bancroft*, 10 Met. (Mass.) 231.

³ *Hurt v. Redd*, 64 Ala. 85.

⁴ *Welsh v. Lewis*, 71 Ga. 387.

⁵ *Drew v. Livermore*, 40 Me. 226. As to the liability of a receiptor, see *Wentworth v. Leonard*, 4 Cush. (Mass.) 414.

⁶ *Evans v. Warren*, 122 Mass. 303; *Whitney v. Farrar*, 51 Me. 418; *Libby v. Cushman*, 29 Me. 429.

different, and affect very differently the rights of third persons. But a mortgagee waiving his claim under the mortgage may attach the mortgaged property to secure the debt, if he chooses to do so, without violating any of the mortgagor's rights.¹ If the mortgagee's attachment is defeated by the forcible seizure of the property by an officer, claiming it under a prior attachment, the mortgage is not waived. The officer, having treated the attachment as a nullity, cannot afterwards insist that as a valid attachment it defeated the mortgage.²

A mortgagee, by attaching the property mortgaged, in an action for another debt due to him from the mortgagor, and satisfying his execution out of the property, thereby waives his right to set up the mortgage against subsequent attaching creditors of the same property.³

Under a statute which makes a mortgage a mere lien upon the property without conferring any title to it, it is probable that an attachment of the mortgaged property by the mortgagee would not amount to a waiver of the mortgaged lien, but would be a cumulative security.

II. *Liability of the Mortgagee's Interest to Attachment or Execution.*

566. A mortgagee's interest in personal property is not subject to attachment or execution, so long at least as he holds this interest in good faith as security, and has not applied it to the satisfaction of his debt by foreclosure or otherwise.⁴ It makes no difference in this respect whether there has been a breach of the condition or not. This is the rule as to mortgages of real estate;⁵ and equal if not stronger reasons exist for maintaining it as regards mortgages of personal property. These are well stated by Mr. Justice Colt, in a recent case in Massachusetts.⁶ But

¹ Buck v. Ingersoll, 11 Met. (Mass.) 226. See § 468.

² Ellinwood v. Holt, 60 N. H. 57.

³ Haynes v. Sanborn, 45 N. H. 429.

⁴ Murphy v. Galloupe, 143 Mass. 123; Prout v. Root, 116 Mass. 410; Thornton v. Wood, 42 Me. 282; Morton v. Hodgdon, 32 Me. 127; Brown v. Bates, 55 Me. 520; Chapman v. Hunt, 13 N. J. Eq. 370; Doughten v. Gray, 10 N. J. Eq. 323; Woodside v. Adams, 40 N. J. L. 417, per

Depue, J.; Jackson v. Willard, 4 Johns. (N. Y.) 41; Glass v. Ellison, 9 N. H. 69; Trapnall v. State Bank, 18 Ark. 53. Such interest cannot be made attachable by joining the mortgagee and mortgagor as defendants in an action upon a joint debt. Murphy v. Galloupe, *supra*.

But otherwise by statute in Vermont. See § 598.

⁵ See Jones on Mortgages, § 701.

⁶ Prout v. Root, *supra*. "The general

after forfeiture, the title having become absolute in the mortgagee, the property may be levied upon by virtue of an execution against him, although it still remains in the hands of the mortgagor.¹

III. *Statutory Provisions and Equitable Rules in the several States.*

567. Alabama.—It is provided by statute that executions may be levied on an equity of redemption in either land or personal property. When any interest less than the absolute title is sold, the purchaser is subrogated to all the rights of the defendant, and is subject to all his disabilities.²

When personal property mortgaged to another is levied on under execution or attachment, the mortgagee, or his assignee, may

property technically passes, but it passes only as needed for the security intended. It is in the nature of a pledge. If it be for the payment of money, then it is treated but as an incident of the debt. An assignment of the mortgage carries the title to the property; and an assignment of the debt, without the mortgage, by operation of law, carries with it, in the absence of any controlling agreement or waiver of the right, an equitable lien on the property which attaches to it in the possession of the mortgagee, and all claiming title under him, with notice. Upon payment or tender to the mortgagee of the debt secured, the title, without further formality, is revested in the mortgagor, and he may maintain replevin for it, or recover damages for its detention. G. S. ch. 151, § 5. But what is more to the point, under our statutes, the mortgagor's interest in the property, so long as his right to redeem remains, is liable, as in the case of real estate, to be attached and taken on execution, as well after as before condition broken; and whether the property be in the possession of the mortgagee or not. Under such an attachment, the property passes into the custody of the sheriff, and there is only left to the mortgagee the right to redeem, after a demand, within a limited time, of the amount due

on his mortgage. If this be paid, the possession of the attaching officer cannot be interfered with, and the mortgagee's title is ended. The rights thus given by statute are inconsistent with the existence of a similar right at the same time to attach the same property in favor of creditors of the mortgagee. It is impossible that two officers should have equal right of possession by virtue of attachments against different parties in favor of different creditors."

¹ *Ferguson v. Lee*, 9 Wend. (N. Y.) 258; *Phillips v. Hawkins*, 1 Fla. 262.

² Code 1886, § 2892. See *Floyd v. Morrow*, 26 Ala. 353; *Anderson v. Hooks*, 9 Ala. 704. No execution can be levied on growing or ungathered crops except to enforce liens for rent or labor. Code 1886, § 2893. Under this statute, the interest of one who has conveyed personal property by bill of sale absolute on its face, as a mere security for the payment of a debt, may be sold under execution, and the sheriff has the right to take the property into his possession. *McConeghy v. McCaw*, 31 Ala. 447.

The mortgagor has an interest which may be sold under execution, when the right of possession is reserved to him until default, or for any definite period. *Heflin v. Slay*, 78 Ala. 180.

try the right of property ; but the plaintiff in the process may pay to the mortgagee, or his assignee, the amount owing on the debt secured by the mortgage ; and in such case the property shall be sold, as well for the payment of the mortgage debt as for the satisfaction of the process, the proceeds of sale to be first applied, after payment of costs, to reimburse the plaintiff the amount so paid by him to such mortgagee or assignee.¹

568. In Arkansas, a mortgagor, or a grantor in a deed of trust to secure a debt, has an equity of redemption which is subject to seizure and sale under execution. But where the grantor parts with his title absolutely, conveying it to the trustee to sell for the purpose of raising a fund to pay debts, it is properly a deed of trust, and no interest, legal or equitable, remains in the grantor, and consequently there is nothing upon which an execution against him can be levied.²

569. Arizona Territory.³— All mortgaged chattels may be attached at the suit of the creditors of the mortgagor. If such property be attached, the creditor shall pay or tender to the mortgagee the actual amount due him on such mortgage before the officer making such attachment shall be entitled to the actual possession of such property. When property thus situated and thus redeemed shall have been sold by the officer by virtue of due legal proceedings, out of the proceeds of the sale he shall first pay to the creditor the amount advanced by him to pay the mortgage, with legal interest thereon ; second, pay all legal costs and fees appertaining to the judgment, execution, and sale ; third, pay the judgment creditor the amount of the judgment, and any remaining surplus to the judgment debtor. If the creditor of the mortgagor prefers, he may cause to be attached the right of redemption of said mortgagor, and cause the same to be sold, subject to the rights of the mortgagee.

Such attachment is made by leaving a copy of the writ of attachment, with notice of the attachment, with the mortgagee.

When the sale of such equity is made on an execution obtained by such attaching creditor, the sum realized shall be applied to

¹ Code 1886, § 3017.

³ Compiled Laws 1877, p. 615, § 5.

² *Turner v. Watkins*, 31 Ark. 429 ;
Pope v. Boyd, 22 Ark. 535.

the payment of costs, fees, discharge of the execution, and any remainder paid the judgment debtor.

When the interest of the mortgagee shall be attached, a copy of the writ of attachment shall be left with the mortgagor, with notice of the attachment, and any payment made by him to the mortgagee after such notice shall not release the attachment or affect the rights of the attaching creditor; but said mortgagor may pay the amount due on said mortgage to the officer who made the attachment, and thereupon said officer shall release said attachment, and hold the money so paid him in the same manner as if he had originally attached said money.

570. California.¹ — Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of the mortgagor. Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county clerk or treasurer, payable to the order of the mortgagee. When the property thus taken is sold under process, the officer must apply the proceeds of the sale to the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

571. Colorado.² — When any personal property, choses in action, or effects of the defendant in the hands of a garnishee are mortgaged or pledged, or in any way liable for the payment of a debt to him, the plaintiff may, under an order of the court for that purpose, pay or tender the amount due to the garnishee; and thereupon the garnishee shall deliver the personal property, choses in action, and effects to the sheriff, as in other cases.

572. Connecticut.³ — When an execution debtor shall own the

¹ Civil Code, §§ 2968-2970; Codes and Stats. 1876, §§ 7968, 7969.

The officer having an attachment or execution is not authorized to levy it without first paying the mortgage debt. *Moore v. Murdock*, 26 Cal. 514; *Swanston v. Sublette*, 1 Cal. 123; *Berson v. Nunan*, 63 Cal. 550.

An officer seizing the property without

paying or tendering the mortgage debt is liable, not for the value of the property, but for the amount of the mortgage debt; for in seizing the property he assumes to make good this debt. *Wood v. Franks*, 56 Cal. 217. See § 573, note.

² Civil Code 1887, § 135; Laws 1887, p. 137.

³ G. S. 1888, § 1185. See *Dyer v. Cady*, 20 Conn. 563.

whole or part of an equity of redemption in a mortgage of both real and personal estate, the execution creditor may cause the same to be levied upon the interest of the debtor in both said real and personal estates; and such interest shall be appraised, and the whole or any part thereof may be set off to the creditor; and appraisers shall be appointed, and all other proceedings shall be had in the same manner as by law provided for the levy of executions upon real estate.

573. Dakota Territory.¹—Personal property mortgaged may be taken under attachment or execution issued at the suit of a creditor of a mortgagor. Before the property is so taken, the officer must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county treasurer, payable to the order of the mortgagee. When the property thus taken is sold under process, the officer must apply the proceeds of the sale as follows: 1. To the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and 2. The balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

574. Georgia.²—Property mortgaged may be sold under other process, subject to the lien of the mortgage. If the mortgage is foreclosed, the mortgagee may place his execution in the hands of the officer of the law making the sale, and cause the title, unincumbered, to be sold, and claim the proceeds according to the date of his lien. Purchasers at public sales of property subject to the lien of a mortgage shall give bond and security in double the value thereof to the officer making the sale, conditioned not to remove the property out of the state, and for its forthcoming to answer to the said lien: provided the mortgagee or his agent files with the officer prior to the sale an affidavit of the amount due on such mortgage, and that he apprehends the loss of said property unless

¹ R. C. 1883, §§ 1753-1755. If the officer levies upon a part of the property without making such tender or payment, but leaves enough property to satisfy the mortgage, in an action against the sheriff by the mortgagee, if he is entitled to recover at all, the recovery is limited to the

value of the property converted, with interest and expenses. *Keith v. Haggart*, 33 N. W. Rep. 465, criticising *Wood v. Franks*, 56 Cal. 217. See § 270.

² Code 1873, and Code 1882, §§ 1967, 1968.

such bond be taken. On failure to give such bond, the property shall be resold at the risk of the purchaser.

575. Florida.¹—Equities of redemption, or the legal right of redemption in real and personal property, shall be subject to levy and sale under executions, upon judgments at common law or upon decrees in equity. Upon application made by the party causing the levy, the courts respectively rendering such judgment, or granting such decree, shall cause the mortgagor, the mortgagee, and all other persons whom the mortgagor, the mortgagee, or either of them, shall state upon oath to be interested in said mortgaged property so levied upon, to come into court and answer upon oath what amount remains due and owing upon said mortgage, what amount has been paid, and to whom and when paid, that the value of said equity or legal right of redemption may be ascertained before the same shall be sold. It shall be the duty of the sheriff, constable, or other officer, to require of the purchaser of such equity or legal right of redemption in personal property as he may levy upon and sell, a bond with two or more good and sufficient securities for the payment of a sum in double the amount of the value of the personal property so levied upon and sold (which valuation it shall be the duty of the officer so selling to assess), to the mortgagee, his heirs, executors, administrators, or assigns, conditioned for the delivery of said property, on demand made by the proper officer of the court, in which said judgment or decree of foreclosure may be rendered, and that said property shall not be removed beyond the limits of this state.

576. Idaho Territory.—All mortgaged personal property may be attached at the suit of any creditor of the mortgagor; such creditor, however, must pay or tender to the mortgagee the amount due him on such mortgage before the officer making such attachment is entitled to the actual possession of such property. When the property thus attached and redeemed by the creditor is held by the officer under due legal proceedings, he must: *First*. Pay to such creditor the amount advanced by him to pay the mortgage, with lawful interest thereon; *Second*. Pay all costs appertaining to the judgment, execution, and sale; *Third*. Pay the judgment creditor the amount of his judgment, and the surplus,

¹ Dig. Laws 1881, p. 522, ch. 102, §§ 8, 9, 10.

if any, to the judgment debtor. If the creditor of the mortgagor prefer, he may cause to be attached the equity of redemption of the mortgagor: such attachment is made by serving upon the mortgagor and the mortgagee a copy of the writ of attachment, together with a notice signed by the officer that the interest of the mortgagor in such property is attached. When the sale of such equity is made on execution obtained by such attaching creditor, the proceeds must be applied to the payment of the costs and the satisfaction of the judgment, and the remainder, if any, paid to the judgment debtor. The purchaser at such sale is entitled to the possession of the property, subject, however, to the rights of the mortgagee.¹

577. Illinois. — The interest of a mortgagor of chattels is subject to execution, before default, where the mortgage authorizes him to retain possession, and there is no provision enabling the mortgagee to take possession in any other event than that of default in payment. The purchaser in such case succeeds to the rights of the mortgagor and to nothing more.² Equity will not enjoin a sale upon execution subject to the mortgage.³

Where by the terms of a mortgage the mortgagor has the right to retain the possession and use of the property until default in the payment of the debt at maturity, but the mortgagee has the right to declare the debt due and to reduce the property to his immediate possession on the happening of a certain contingency, such as the levy of an execution upon the property, the mortgagor in possession has such an interest in the property as may be seized on execution against him; and in case of the non-exercise by the mortgagee of any right he may have to take possession, all the rights of the mortgagor in the property and no more may be sold under such execution. The mere levy of the execution does not at once mature the notes, but only gives the mortgagee the right to declare them due. Until that affirmative act is done, the rights, duties, and obligations of all parties remain precisely the same as if the mortgage had contained no such provision. Until such act is done, the attaching creditor may levy and sell subject to the

¹ R. S. 1887, § 3389.

² *Durfee v. Grinnell*, 69 Ill. 371; *Merritt v. Niles*, 25 Ill. 282; *Beach v. Derby*, 19 Ill. 617; *Spaulding v. Mozier*, 57 Ill.

148; *Lewis v. D'Arcy*, 71 Ill. 648; *Prior v. White*, 12 Ill. 261; *Holladay v. Bartholomæ*, 11 Bradw. 206.

³ *Spaulding v. Mozier*, *supra*.

chattel mortgage.¹ The case is the same where the terms of the mortgage authorize the mortgagee to take possession if he shall at any time feel unsafe or insecure. But in all such cases the levy of the execution before any action is taken by the mortgagee does not defeat his right to reduce the property to possession. It is only with the permission or non-action of the mortgagee that the property under such mortgages can be sold on execution.² A person making a levy upon mortgaged goods in the possession of the mortgagor is not a trespasser in making such levy, whether the mortgage contains the security clause or not.³

But it seems that the mortgagee on taking possession may be compelled to offer the property for sale at once. If the mortgagee satisfy his mortgage by a sale of a part of the mortgaged property, the execution creditor may levy upon and sell the remainder.⁴ If the mortgagee reduce the property to possession before the levy, or take it from the officer after the levy, the execution creditor's only remedy is by garnishee process, by means of which he can reach any surplus in the mortgagee's hands after satisfaction of his debt if all the property be sold.⁵

A mortgagee who has just taken possession of the mortgaged chattels is not subject to garnishee process, although the value of the property be of greater value than the amount of the mortgage. In case the mortgagee had sold the mortgaged chattels, and had an excess in his hands after satisfying the debt secured, or in case he had refused to sell according to the terms of the mortgage, and converted the property to his own use, he might, perhaps, be charged in such process.⁶

Where the mortgage gives the mortgagee the right to reduce the property to his immediate possession upon the levy of an execution or attachment, the mortgagee may or may not, at his election, exercise this right before the maturity of the debt; and if he does not, but suffers the property to be sold under the writ of execution or attachment, the purchaser simply succeeds to the rights of the mortgagor, and acquires a mere equity of redemption, the property in his hands being still subject to the mortgage.⁷

¹ *Beach v. Derby*, 19 Ill. 617; *Simmons v. Jenkins*, 76 Ill. 479.

² *Durfee v. Grinnell*, 69 Ill. 371; *Simmons v. Jenkins*, 76 Ill. 479.

³ *Holladay v. Bartholomæ*, 11 Bradw. 206.

⁴ *Lewis v. D'Arcy*, 71 Ill. 648.

⁵ *Pike v. Colvin*, 67 Ill. 227.

⁶ *Dieter v. Smith*, 70 Ill. 168.

⁷ *Durfee v. Grinnell*, *supra*; *Pike v.*

578. Indiana.¹ — Goods and chattels pledged, assigned, or mortgaged as security for any debt or contract may be levied upon and sold on execution against the person making the pledge, assignment, or mortgage, subject thereto, and the purchaser shall be entitled to the possession, upon complying with the conditions of the pledge, assignment, or mortgage.²

579. Iowa. — A mortgagor has no such interest as can be levied on and sold under execution or attachment,³ unless the mortgagor has the right of possession for a definite period.⁴ The

Colvin, 67 Ill. 227; *Simmons v. Jenkins*, 76 Ill. 479; *Cleaves v. Herbert*, 61 Ill. 126; *Prior v. White*, 12 Ill. 261, 262.

¹ R. S. 1876, p. 207, § 436; R. S. 1881, § 722. See § 556, last paragraph.

² This provision gives the purchaser no right of possession of the property, except upon his complying with the conditions of the mortgage. *Broadhead v. McKay*, 46 Ind. 595. If possession be delivered to the purchaser without requiring compliance with the conditions of the mortgage, the sheriff is liable in damages to the mortgagee. *State v. Milligan*, 106 Ind. 109; *Kackley v. State*, 91 Ind. 437. But the officer making the levy is entitled to temporary possession, as against the mortgagee, for the purpose of selling the property subject to the mortgage. *Sparks v. Compton*, 70 Ind. 393; *Emmons v. Hawn*, 75 Ind. 356. See § 556; *Geisendorf v. Eagles*, 70 Ind. 418; *Foster v. Bringham*, 99 Ind. 505. But the officer making the levy must exercise due care for the protection of the mortgagee's interest. When the property consists of separate articles, it must be sold together, subject to the mortgage. Neither can the officer rightfully interfere with the sale of the property by the mortgagee under a power of sale. The officer is liable in trover for levying on and detaining the property after a sale by the mortgagee under the power. *Syfers v. Bradley* (Ind.), 16 N. E. Rep. 805. The execution is a lien merely upon the debtor's equity of redemption. A judgment of foreclosure does not merge the lien of the mortgage, and supplant it

by a new lien springing into existence with the decree. The execution can be levied only upon such interest in the property as the debtor had when the lien of the execution attached. *Manns v. Brookville Nat. Bank*, 73 Ind. 243; *Evansville Gas-Light Co. v. State*, 73 Ind. 219; *Louthain v. Miller*, 85 Ind. 161; *Hackleman v. Goodman*, 75 Ind. 202; *State v. Milligan*, *supra*.

³ *Wells v. Sabeloswitz*, 68 Iowa, 238; *Gordon v. Hardin*, 33 Iowa, 550; *Campbell v. Leonard*, 11 Ib. 489; *M'Connell v. Denham*, 72 Iowa, 494; 34 N. W. Rep. 298; *Vanslyck v. Mills*, 34 Iowa, 375; *Parker v. Knight*, 63 Iowa, 365.

⁴ *Rindskoff v. Lyman*, 16 Iowa, 260, per Dillon, J. "The mortgagor himself, if not restrained by the terms of the mortgage, may use the property, or even remove it. His grantee, whether by voluntary transfer or by sheriff's sale, may, in the absence of stipulation to the contrary, do the same. If waste or removal is threatened under such circumstances as would give the mortgagee the right to a receiver, or an injunction as against the mortgagor, the same circumstances would also give a right to the same relief as against his vendee, or the vendee of the sheriff."

A second mortgagee is entitled to the possession of the mortgaged property as against all the world except the first mortgagee, and the second mortgagee may recover possession of the property from an officer who has seized it upon a writ against the mortgagor. *Sperry v. Ethridge*, 70 Iowa, 27.

effect of a sale under execution in such case is the same as if it were made by the mortgagor in the ordinary way: the purchaser obtains the right of possession and use of the property until the day of payment, and the right to redeem. If it be objected that the rights of the mortgagee may be imperilled through a sale to an irresponsible person, who may waste or remove the property, the answer is, there is no legal prejudice to the rights of the mortgagee.

If mortgaged property be seized upon execution, when by the terms of the mortgage the mortgagee has the right at any time, when he may choose to do so, even before the maturity of the mortgage debt, to take possession of the property, the mortgagee may assert that right when the property is so seized; and when he has done so, there is no interest left in the mortgagor which is subject to execution.¹

It seems that a mortgagee in possession may be garnished for the surplus that may remain in his hands after satisfying his mortgage.² But if the mortgagor's equity of redemption be assigned for the benefit of his creditors, the assignee cannot be held as a garnishee in a suit commenced after the assignment.³ Upon the same principle, if a mortgagor agrees with his mortgagee and an attaching creditor that the mortgaged chattels shall be sold and the proceeds applied to the payment of the mortgage and the attachment in the order of their priority, the agreement operates as a transfer of the mortgagor's equity of redemption for this purpose, and it will take priority over a subsequent garnishment by another creditor of the mortgagor.⁴

A mortgagee not in possession of the mortgaged property cannot be charged as trustee or garnishee in a suit by a creditor of the mortgagor;⁵ and he cannot be compelled to take possession of

The mortgagor's assignee for the benefit of creditors may recover the mortgaged property from an attaching creditor. *Goldsmith v. Willson*, 67 Iowa, 662.

¹ *Wells v. Chapman*, 59 Iowa, 658; 13 N. W. Rep. 841.

² *Torbert v. Hayden*, 11 Iowa, 435, 444, per *Lowe, J.*; *Doane v. Garretson*, 24 Iowa, 351; *McConnell v. Denham*, 72 Iowa, 494. How mortgaged chattels may be reached by creditors is a matter dis-

cussed, but not decided, in *Fountain v. Smith*, 70 Iowa, 282.

A garnishing creditor cannot have a sale made by the mortgagee set aside for fraud, unless he first establishes the fraud. *Tootle v. Taylor*, 64 Iowa, 629.

³ *Gimble v. Ferguson*, 58 Iowa, 414; 10 N. W. Rep. 789.

Phelps v. Winters, 59 Iowa, 561, 563; 13 N. W. Rep. 729.

⁵ *McConnell v. Denham*, *supra*; *Fountain v. Smith*, *supra*.

the property after garnishment, and cannot be held liable, though the value of the property exceed the mortgage debt.¹

579 *a*. Kansas. — Mortgaged chattels in the possession of the mortgagor before default, may be levied upon by execution against the mortgagor in favor of a creditor; but the levy attaches to and covers only the interest of the mortgagor, and after default the mortgagee has the right to take possession of the property as against the officer levying such execution.²

580. Kentucky.³ — When the defendant in an execution owns the legal title in any personal estate, and shall have created a *bond fide* incumbrance thereon by mortgage, deed of trust, or otherwise, before an execution has created a lien on the same, the interest of the defendant in such property may be levied on and sold subject to such incumbrance. The purchaser at the sale shall acquire a lien on such property for the purchase money, and interest at the rate of ten per centum per annum from the day of sale until paid, subject to the prior incumbrances.

Any other creditor, whether by judgment or otherwise, may, after such execution and sale, by equitable proceedings, subject the incumbered property to sale, and, after satisfying prior liens, have his demand satisfied out of the proceeds of the residue. The proceedings in equity must be instituted before the purchaser has, by suit, removed the incumbrance.

The defendant in the execution may redeem the property so sold by paying the original incumbrance, with legal interest thereon, and by paying the purchaser his purchase money, with ten per centum per annum interest thereon.

The purchaser of incumbered movable property must, before possession thereof is delivered to him, give an obligation, with good surety, payable to the incumbrancer and the owner, stipulating that the property shall not be removed out of the county, and shall be preserved and forthcoming, unavoidable accidents excepted, to answer the incumbrance and for redemption, and deliver the obligation to the officer, to be returned with the execution. Courts of equity shall have the control of all incumbered

¹ *Curtis v. Raymond*, 29 Iowa, 52; *Muse v. Lehman*, 30 Kans. 514; *McVay First Nat. Bank v. Perry*, 29 Iowa, 266. *v. English*, 30 Kans. 368.

² *Ament v. Greer*, 37 Kans. 648. See ³ G. S. 1873, and 1881, p. 435, §§ 1, 2.

property sold under execution, and the power to make all needful orders for the preservation and forthcoming of all property and its issues and profits, to satisfy the incumbrance, and to secure the rights of others.¹

581. Maine.²—Personal property not exempt from attachment, mortgaged, pledged, or subject to any lien created by law, and of which the debtor has the right of redemption, may be attached, held, and sold as if unincumbered, if the attaching creditor first tenders or pays the mortgagee, pledgee, or holder the full amount unpaid on the demand so secured thereon. When personal property, attached on a writ or seized on execution, is claimed by virtue of such mortgage, pledge, or lien, the claimant shall not bring an action against the attaching officer therefor until he has given him at least forty-eight hours' written notice of his claim and the true amount thereof;³ and the officer or creditor may, within that time, discharge the claim by paying or tendering the amount due thereon, or he may restore the property. The officer may give the claim-

¹ Under this statute the sheriff, by virtue of his authority to sell the mortgagee's interest under execution, may lawfully take possession of the property as against the mortgagor, and sell the equity of redemption; and a purchaser would have the right to hold possession, although the latter may have failed to deliver or the sheriff to take the bond required by the statute, for the security of the mortgagee. But the mortgagee holding the legal title has the right, after default, to recover possession of the property from the mortgagor, and from any person holding under him by private purchase, or on execution sale, unless the bond provided by statute has been given to him. *Mercer v. Tinsley*, 14 B. Mon. (Ky.) 273. See *Fugate v. Clarkson*, 2 B. Mon. 41; *Dedman v. Bridges*, 9 Ib. 474. The holder of an unrecorded mortgage, having given notice his mortgage, may arrest a sale of the of property under execution in favor of a creditor of the mortgagor. *Baldwin v. Crow* (Ky.), 7 S. W. Rep. 146.

² R. S. 1883, ch. 81, §§ 43-46. For proceedings where the mortgage secures

the performance of collateral agreements, see Acts 1887, ch. 129.

To render a mortgage or pledge valid, as against attaching creditors of the mortgagor or pledgor, there must be a distinct and specific condition that can be clearly stated, on performance of which the property would be released. *Fairfield Bridge Co. v. Nye*, 60 Me. 372.

The mortgagor's interest may be attached, although the record title stands absolutely in the mortgagee's name. *Perry v. Somerby*, 57 Me. 552.

See notes to § 583.

³ See *Fairfield Bridge Co. v. Nye*, *supra*. Such notice is not necessary if the plaintiff claims under an absolute bill of sale. *Douglass v. Gardner*, 63 Me. 462. A substantial performance of the requirements of the statute by the mortgagee is a condition precedent to the maintenance of his action. *Nichols v. Perry*, 58 Me. 29; *Wolfe v. Dorr*, 24 Me. 104. The same notice required in a suit against the officer is required in a suit against his servant in whose hands the property has been placed for safe keeping. *Potter v. McKenney*, 78 Me. 80.

ant written notice of his attachment; and if he does not, within ten days thereafter, deliver to the officer a true account of the amount due on his claim, he thereby waives the right to hold the property thereon; and if his account is false, he forfeits to the creditor double the amount of the excess, to be recovered in an action on the case. If the creditor redeems such property, and it is subsequently sold by the officer, he shall, from the proceeds, first pay to the creditor the amount with interest paid by him to redeem, and apply the balance, if any, to the debt on which it was attached or seized on execution.¹

When a trustee² states in his disclosure that he had, at the time the process was served on him, in his possession property not exempted by law from attachment, mortgaged, pledged, or delivered to him by the principal defendant to secure the payment of money due to him, and that the principal defendant has an existing right to redeem it by payment thereof, the court or justice before which the action is pending shall order that, on payment or tender of such money by the plaintiff to said trustee within such time as the court orders, and while the right of redemption exists, he shall deliver the property to the officer serving the process, to be held and disposed of as if it had been attached on mesne process; and in default thereof, that he shall be charged as the trustee of the principal debtor. This order shall be entered on the records of the court or justice. On the return of the *scire facias* against such trustee, if it appears that the plaintiff has complied with the order of the court or justice, and that the trustee has refused or neglected to comply therewith, the court or justice shall enter up judgment against him for the amount due and returned unsatisfied on the execution, if there appears to be in his

¹ A mortgagee not delivering such statement within ten days, waives his right to hold the property by virtue of his mortgage. *Colson v. Wilson*, 58 Me. 416.

² R. S. 1871, ch. 86, §§ 50, 51.

Before the statute of 1835, ch. 188, a mortgagee was not chargeable in trustee process for the surplus, in the absence of fraud. *Howard v. Card*, 6 Me. 353.

He is not chargeable under the statute unless he has *actual* possession of the property. *Pierce v. Henries*, 35 Me. 57; *Wood v. Estes*, 35 Me. 145; *Mace v. Heald*, 36

Me. 136; *Reggio v. Day*, 37 Me. 314; *Stedman v. Vickery*, 42 Me. 132.

A mortgagee is not chargeable in case he has sold and transferred the debt and mortgage prior to service upon him. *Wood v. Estes*, *supra*. Nor is he chargeable if, having had possession, he has surrendered the property to the mortgagor prior to service upon him. *Wood v. Estes*, *supra*. One holding the property as agent of the mortgagee is not chargeable therefor as the trustee of the mortgagor. *Skowhegan Bank v. Farrar*, 46 Me. 293.

hands such an amount of the property mortgaged over and above the sum due to him; but if not, then for the amount of said property exceeding that sum, if any; and the amount of this excess shall, on the trial of *scire facias*, be determined by the court or jury.

582. In Maryland, although a mortgagor's interest in personal property cannot be seized and sold under execution, yet a creditor may file a bill and obtain a decree for the sale of the property absolutely to pay off the incumbrance, so as to satisfy his own claim from the surplus.¹ It would seem that to sustain such a bill it should be alleged and proved that the mortgaged property is more than sufficient to pay the mortgage debt.²

583. Massachusetts.³—Personal property of a debtor that is subject to a mortgage, pledge, or lien, and of which the debtor has the right of redemption, may be attached and held in like manner as if it were unincumbered,⁴ if the attaching creditor pays or tenders to the mortgagee, pawnee, or holder of the property the amount for which it is so liable, within ten days after the same is demanded.⁵ Every such mortgagee, pawnee, or holder

¹ *Rose v. Bevan*, 10 Md. 466; *Harris v. Alcock*, 10 G. & J. (Md.) 226, 251.

² *Rose v. Bevan*, *supra*.

³ G. S. 1860, ch. 123, §§ 62–66; P. S. 1882, ch. 161, §§ 74–78. An attachment made before the mortgage is recorded, though it be recorded within fifteen days from its date, takes precedence of the mortgage, the property itself not having been delivered. *Drew v. Streeter*, 137 Mass. 460. The statute contemplates a redemption of the mortgage by the attaching creditor. It makes no provision for an assignment of the mortgage to such creditor upon tender of the amount due, and a bill in equity cannot be maintained to compel such an assignment. *Cochrane v. Rich*, 142 Mass. 15.

⁴ Property subject to a mortgage to secure future or contingent liabilities may be attached. *Haskell v. Gordon*, 3 Met. 268; *Codman v. Freeman*, 3 Cush. 306; *Hills v. Farrington*, 6 Allen, 80. But it cannot be taken upon execution without a

previous attachment. *Lyon v. Coburn*, 1 Cush. 278. But if the mortgage is fraudulent and void as to creditors, a creditor can levy an execution upon the property, as if the mortgage had no existence. The mortgage may be good as between the parties, yet voidable by creditors of the mortgagor. Per *Field, J. Sherman v. Davis*, 137 Mass. 132.

⁵ These provisions do not apply to an attachment by trustee process. *Putnam v. Cushing*, 10 Gray, 334. Neither do they apply to attachments under a process from a United States court. *Howe v. Freeman*, 14 Gray, 566.

The demand should be made within a reasonable time after the attachment. *Johnson v. Sumner*, 1 Met. 172; *Brackett v. Bullard*, 12 Met. 308; *Tapley v. Butterfield*, 1 Met. 515; *Housatonic & Lee Banks v. Martin*, 1 Met. 294. A demand made four months after the attachment, though after the sale of the property attached, was held to be made within a rea-

shall, when demanding payment of the money due to him, state in writing a just and true account of the debt or demand for which the property is liable to him, and deliver it to the attaching creditor or officer.¹ If the same is not paid or tendered to him

sonable time, the officer having had actual notice of the claim soon after the attachment and before the sale. *Legate v. Potter*, 1 Met. 325. See *Canada v. Southwick*, 16 Pick. 556.

If the attaching creditor pays the amount demanded by the mortgagee, who thereupon assigns to the creditor his interest in the mortgage, the creditor cannot, upon a failure of the title to the property, recover from the mortgagee the amount so paid, on the ground of a payment under mistake as to the validity of the mortgage. *Sears v. Leland*, 145 Mass. 277.

An infant mortgagee may make a valid demand under the statute. *Bradford v. French*, 110 Mass. 365.

One to whom a pledgee of goods, with the pledgor's consent, has consigned them for sale, can in his own name make demand. *Clark v. Dearborn*, 103 Mass. 335.

The mortgagee may make demand, although he has taken the mortgaged goods from the attaching officer on a writ of replevin and has removed them out of the state. *Moore v. Quirk*, 105 Mass. 49.

An attachment of property conveyed by a bill of sale absolute in form, but really given as collateral security, can be dissolved only by a demand in accordance with the statute. *Putnam v. Rowe*, 110 Mass. 28.

The fact that the mortgage contains a stipulation that, if the property is attached by any other creditor, the mortgagee may take immediate possession, does not take the case out of the operation of the statute. *Hunt v. Williams*, 106 Mass. 114; *Wing v. Bishop*, 9 Gray, 223. See *Alden v. Lincoln*, 13 Met. 204.

The statute applies to attachments made after the commencement of proceedings to foreclose the mortgage, if made before the foreclosure is complete. *Sullivan v. Lamb*, 110 Mass. 167.

The property, while in the custody of

the officer, is liable to successive attachments. *Wheeler v. Bacon*, 4 Gray, 550; *Howe v. Bartlett*, 1 Allen, 29; *Macomber v. Baker*, 3 Allen, 241.

A mortgagee who has assigned his mortgage and recorded his assignment cannot make a valid demand. *Granger v. Kellogg*, 3 Gray, 490; *Horne v. Briggs*, 98 Mass. 510.

¹ The demand need not be formal. *Moriarty v. Lovejoy*, 23 Pick. 321; *Brewster v. Bailey*, 10 Gray, 37; *Gassett v. Sanborn*, 8 Gray, 218; *Molineux v. Coburn*, 6 Gray, 124. Errors and inaccuracies in stating the account which result from accident or mistake, and do not mislead or injuriously affect the attaching creditor, do not invalidate the demand. *Bicknell v. Cleverly*, 125 Mass. 164; *Folsom v. Clemence*, 111 Mass. 273; *Hills v. Farrington*, 6 Allen, 80; *S. C.* 3 Allen, 427; *Harding v. Coburn*, 12 Met. 333; *Rowley v. Rice*, 10 Met. 7. But an inaccurate account will invalidate the demand, unless it be shown not only that it was made with honest intention, but also that no damage has accrued to the other party by reason of the mistake. *Rowley v. Rice*, *supra*; *Harding v. Coburn*, *supra*; *Clark v. Dearborn*, *supra*.

A demand is good though for an amount larger than is due, if the amount exceeds the value of the property. *Clark v. Dearborn*, *supra*; *Bigelow v. Capen*, 145 Mass. 270.

An overstatement of the amount due is immaterial if the means of computing the true amount are supplied by the demand itself. *Folsom v. Clemence*, *supra*.

If the mortgage be one of indemnity, the formal and proper mode of stating the demand is to describe the liability which the mortgage was given to indemnify against. *Putnam v. Rowe*, *supra*; *Codman v. Freeman*, 3 Cush. 306; *Haskell v. Gordon*, 3 Met. 268; *Buck v. Ingersoll*, 11

within ten days thereafter, the attachment shall be dissolved and the property shall be restored to him; and the attaching creditor shall moreover be liable to him for any damages he has sustained by the attachment.¹ If he demands and receives more than the

Met. 226. A demand which simply states the amount of the mortgage, if that be the amount of the liability against which the mortgagee is indemnified, is sufficient. *Bicknell v. Cleverly*, 125 Mass. 164; *Degnan v. Farr*, 126 Mass. 297¹; *Hanson v. Herrick*, 100 Mass. 323; *Johnson v. Sumner*, 1 Met. 172; *Barker v. Buel*, 5 Cush. 519; *Varney v. Hawes*, 68 Me. 442. If the mortgage was given to secure future advances, a demand of the aggregate of the advances is sufficient. *Hills v. Farrington*, 6 Allen, 80.

Parol evidence of the actual consideration of the mortgage note is admissible to establish the truth of the account. *Hanson v. Herrick*, *supra*.

The amount due upon the mortgage may be stated in a single item. *Johnson v. Sumner*, *supra*; *Housatonic & Lee Banks v. Martin*, 1 Ib. 294; *Jones v. Richardson*, 10 Ib. 481. Such a statement is sufficient when the mortgage debt is made up of several items, if these are not called for. *Hills v. Farrington*, 6 Allen, 80; *S. C.* 3 Allen, 427.

It seems that the mortgagee may demand the whole amount due, although he is in possession of a part of the mortgaged property. *Rhode Island Central Bank v. Danforth*, 14 Gray, 123. The amount remaining unpaid must be stated. *Sprague v. Branch*, 3 Cush. 575, 576.

If the mortgagee has several mortgages, and he specifies his claim under one mortgage only, such demand will not support a claim under either of the others. *Witham v. Butterfield*, 6 Cush. 217.

If interest be due under the mortgage, it should be computed and added, or interest should be demanded in general terms, the time for which it is due and the rate being given. *Johnson v. Sumner*, *supra*. The demand for the principal debt is good, although no interest be demanded. *Jones v. Richardson*, 10 Met. 481. A de-

mand for interest without stating the rate implies only the rate of interest established by law. *Robinson v. Sprague*, 125 Mass. 582. An understatement of the amount of interest, when the mortgagee has not the means of computing the interest exactly, does not render his account untrue. *Johnson v. Sumner*, *supra*. The date from which interest is due should be stated, but the amount need not be computed. *Averill v. Irish*, 1 Gray, 254.

It is not necessary for the mortgagee, in his written demand, to designate the articles included in his mortgages so as to distinguish them from others of a like character. *Folsom v. Clemence*, 111 Mass. 273; *Morrill v. Keyes*, 14 Allen, 222; *Harding v. Coburn*, 12 Met. 333; *Codman v. Freeman*, 3 Cush. 306. If the demand specifies the articles claimed under the mortgage, but omits one article covered by the mortgage, the attachment as to such article is not defeated. *Woodward v. Ham*, 140 Mass. 154. A reference to the record of the mortgage for an enumeration of the articles claimed may be sufficient. *Moriarty v. Lovejoy*, 23 Pick. 321; *Harding v. Coburn*, 12 Met. 333, 340.

A mortgagee holding two mortgages conveying different articles may make a demand sufficient as to one mortgage and insufficient as to the other. *Simonds v. Parker*, 3 Met. 144.

There is no occasion for a demand by a nominal mortgagee who really holds his title by pledge from a person other than the nominal mortgagor. *Spring v. Baker*, 8 Allen, 267.

¹ Failure to restore the property to the mortgagee within the time limited, or to pay the amount due on his mortgage, constitutes a conversion of the property. *Alden v. Lincoln*, 13 Met. 204; *Robinson v. Sprague*, *supra*.

The measure of damages is the value of the property at that time, not exceed-

amount due to him, he shall be liable for the excess, with interest thereon at the rate of twelve per cent. a year, to be recovered by the attaching creditor in an action of contract for money had and received. When property attached and redeemed as aforesaid is sold on mesne process or on execution, the proceeds thereof, after deducting the charges of the sale, shall be first applied to repay the attaching creditor the amount so paid by him, with interest.¹ If the plaintiff, after having redeemed the goods, does not recover judgment in the suit, he shall nevertheless be entitled to hold the goods until the defendant repays to him the sum which he paid for the redemption, or as much thereof as the defendant would have been obliged to pay to the mortgagee, pawnee, or holder of the goods, if they had not been attached, with interest from the time when the same is demanded of the defendant.²

It is further provided in Massachusetts,³ that personal property of a debtor, subject to a mortgage, and being in the possession of the mortgagor, may be attached in the same manner as if unincumbered; and the mortgagee or his assigns may be summoned in the same action in which the property is attached, as the trustee of the mortgagor or his assigns, to answer such questions as may be put to him or them by the court or by its order touching

ing, however, the amount of the mortgagee's claim. *Forbes v. Parker*, 16 Pick. 462.

A pledgee is entitled to recover the full value of the goods. *Pomeroy v. Smith*, 17 Pick. 85.

A mortgagee in an action of tort against an officer, for attaching and selling the mortgaged property, cannot properly join an alternative count in contract for money had and received. *Clapp v. Campbell*, 124 Mass. 50.

¹ A mortgagee does not waive his right to demand and receive the amount for which the property is liable to him by having sued out a writ of replevin against the officer attaching the property. *Moore v. Quirk*, 105 Mass. 49.

The attaching officer may defend a suit brought by the mortgagee for conversion of the property, by setting up the mortgagee's want of title, or that the mortgage is void. *Hanson v. Herrick*, 100 Mass. 323.

² An attachment is dissolved by the death of the debtor before the property is seized upon execution. *Parsons v. Merrill*, 5 Met. 356.

If an attachment be dissolved by the insolvency of the mortgagor, it is the duty of the attaching officer to deliver the property to the mortgagee, and not to the assignee of the mortgagor. *Howe v. Bartlett*, 8 Allen, 20; *Briggs v. Parkman*, 2 Met. 258.

A collusive attachment of the mortgagor's interest in the mortgaged property in a fictitious suit, for the purpose of depriving the mortgagee of the property, is void as to him. *Crocker v. Atwood*, 144 Mass. 588; 12 Atl. Rep. 421.

³ G. S. 1860, ch. 123, §§ 67-71; P. S. 1882, ch. 161, §§ 79-83. Aside from the statute a mortgagee of personal property, not in possession of it, is not chargeable as the trustee of the mortgagor. *Central Bank v. Prentice*, 18 Pick. 396.

the consideration of the mortgage and the amount due thereon. If, upon such examination or upon the verdict of a jury, it appears to the court that the mortgage is valid, the court, having first ascertained the amount justly due upon it, may direct the attaching creditor to pay the same to the mortgagee or his assigns within such time as it orders; and if the attaching creditor does not pay or tender the sum within the time prescribed, the attachment shall be void and the property shall be restored.² If the attaching creditor denies the validity of the mortgage, and moves that the same may be tried by a jury, the court shall order such trial on an issue to be framed under the direction of the court, and if, upon such examination or verdict, the mortgage is adjudged valid, the mortgagee or his assigns shall recover his costs.³ When the creditor has paid to the mortgagee or his as-

¹ It has been suggested that the only proper mode of attaching goods mortgaged to secure the performance of any obligation other than the payment of money is by summoning the mortgagee as trustee of the mortgagor. Per Shaw, C. J., in *Johnson v. Sumner*, 1 Met. 172.

The attachment is invalid if the mortgagee summoned as trustee is a resident of another state, and has no usual place of business in Massachusetts. *Allen v. Wright*, 134 Mass. 347; *S. C.* 136 Ib. 193.

If a mortgagee summoned as trustee be defaulted, he is estopped to maintain an action against the officer for a conversion of the mortgaged property by levying execution upon it. The mortgagee must abide the final judgment as to the validity of the mortgage. *Flanagan v. Cutler*, 121 Mass. 96.

The attaching creditor by this process acquires the right to try the validity of the mortgage, either by examining the mortgagee under oath or by a trial by jury, at his election, and the mortgagee cannot replevy the property during the continuance of the attachment. *Furber v. Dearborn*, 107 Mass. 122.

But the creditor must pursue his remedy in the mode pointed out by the statute. *Boynton v. Warren*, 99 Mass. 172. If the creditor discharges the trustee he vacates

the attachment of the property, and entitles the mortgagee to the possession of it. *Martin v. Bayley*, 1 Allen, 381; *Hayward v. George*, 13 Ib. 66.

After an answer by the mortgagee disclaiming all right as mortgagee, his discharge as trustee does not dissolve the attachment. *Simmons v. Woods*, 144 Mass. 385.

If the trustee be discharged without examination upon his general answer denying that he had any goods of the defendant, but not disclosing his mortgage, the attachment is dissolved and the mortgagee may recover from the officer the proceeds of a sale of the mortgaged property. *Goulding v. Hair*, 133 Mass. 78.

² The provisions of this statute are not unconstitutional on the ground that the mortgagee is denied the right to have the validity of the mortgage determined by a jury. *Jackson v. Kimball*, 121 Mass. 204. A mortgage given to secure the mortgagee against liability as indorser is valid although his liability does not become absolute until after the attachment by trustee process. *Rogers v. Abbott*, 128 Mass. 102.

³ If the plaintiff in such suit fails to maintain his action, the original seizure does not thereby become unlawful. *Jackson v. Kimball*, *supra*. It is only when

signs the sum directed by the court, he shall be entitled to retain out of the proceeds of the property attached, when sold, the sum so paid, with interest, and the balance shall be applied to the payment of his debt. If the attaching creditor, after having paid the sum directed by the court, does not recover judgment in the suit, he shall nevertheless be entitled to hold the property until the debtor has repaid, with interest, the sum so paid by order of court.¹

584. Michigan.²—When goods or chattels shall be pledged

he (the officer) unreasonably neglects or refuses to return the property, after the failure of the action, or when the attaching creditor fails to pay the amount of the mortgage when it is established according to the order of the court, that the mortgagee can maintain an action for conversion. *Jackson v. Colcord*, 114 Mass. 60.

If, however, goods in possession of the mortgagee are attached by an actual seizure of the property, and the amount of the mortgage is not paid upon demand, and at the same time he is summoned as trustee, the mortgagee may, at any time after the seizure of the property, maintain an action of tort for its conversion, or may recover it in an action of replevin. The officer is in such case a trespasser *ab initio*. *Porter v. Warren*, 119 Mass. 535. The attachment is illegal, or is dissolved by failure to pay the amount of the mortgage, and the mortgagee while in possession of the property cannot be summoned as trustee. But the mortgagee alone can take advantage of this irregularity. *Bergin v. Hayward*, 102 Mass. 414.

When a mortgagee or pledgee is summoned as trustee, the attaching creditor may, under order of court, pay or tender the amount due the trustee, and receive the goods. For provisions regulating proceedings in such case, see P. S. 1882, ch. 183, §§ 66-69.

¹ The provisions of G. S. ch. 123, § 73, in relation to the sale of attached personal property when it is of a perishable nature, apply to mortgaged personal property, and

no notice in such case is required to be given to the mortgagee summoned as trustee. *Jackson v. Colcord*, *supra*.

After the mortgaged property has been attached and the mortgagee summoned as trustee, he cannot give notice and foreclose his mortgage. *Hobart v. Jouvett*, 6 Cush. 105.

² Compiled Laws 1871, § 6097; Annotated Stats. 1882, § 7682. See *Bayne v. Patterson*, 40 Mich. 658; *Baldwin v. Talbot*, 43 Mich. 11; *S. C.* 46 Ib. 19; *Comstock v. Hollon*, 2 Mich. 355.

This statute does not allow the mortgaged property to be taken from a mortgagee in possession and sold in parcels: it only allows the sale to be made subject to the mortgage; and it is only upon payment or tender of the amount due that the purchaser obtains any rights whatsoever. *Daggett v. McClintock*, 56 Mich. 51; *Walker v. White*, 60 Mich. 427. He cannot sell in parcels without first discharging the lien. Without first redeeming he can sell only the right to redeem the entire property. This right is not divisible. *Worthington v. Hanna*, 23 Mich. 530; *Cary v. Hewitt*, 26 Mich. 228; *Haynes v. Leppig*, 40 Mich. 602; *Barber v. Smith*, 41 Mich. 138; *Wood v. Weimar*, 104 U. S. 786; *Baldwin v. Talbot*, *supra*; *Smith v. Menominee Circuit Judge*, 53 Mich. 560. In the latter case it was held not only that the officer must levy upon the whole mortgaged property and sell it together in one parcel, but also that, if he does not find it all together, he must have time after levying on part to find

by way of mortgage or otherwise, for the payment of money or the performance of any contract or agreement, such goods or chattels may be levied upon and sold on execution against the person making such pledge, subject to the lien of the mortgage or pledge existing thereon, and the purchaser at such sale shall be entitled to pay to the person holding such mortgage or pledge the amount actually due thereon, or otherwise perform the terms and conditions of the pledge, at any time before the actual foreclosure of such mortgage or pledge; and on such payments or performances, or a full tender thereof, shall thereupon acquire all the right, interest, and property which the defendant in execution would have had in such goods or chattels if such mortgage or pledge had not been made.¹

585. Minnesota.² — When goods or chattels are pledged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.

and levy upon the remainder, if within his bailiwick.

The mortgagee's possession cannot ordinarily be disturbed by garnishment process for the sake of reaching the surplus. *Smith v. Menominee Circuit Judge*, 53 Mich. 560; *Wilson v. Montague*, 57 Mich. 638.

The mortgagee and the officer may hold concurrent possession before foreclosure. The officer cannot sell in parcels so long as the mortgage is in force, and must not interfere with the mortgagee's right of sale, but can retain the chattels in his possession until sale is made, and has a right to know the amount and conditions of it. When the mortgagee proceeds to sell, there is no reason why he cannot so far act in concert with the officer as to protect the rights of both. *Haynes v. Leppig*, 40 Mich. 602.

If a mortgagee takes possession in the mortgagor's behalf before foreclosure, to

screen the property from execution, it is fraud; and if, having a mortgage, he sets up some other title, such as that by bill of sale, against creditors levying on a mortgaged interest, or if not in possession in good faith under his mortgage, fraud may be inferred. *Haynes v. Leppig*, *supra*.

Mortgaged goods in the possession of the mortgagor may be attached; but the officer must surrender them to the mortgagee on demand, after his inventory and appraisal have been completed, unless the attaching creditor disputes the validity of the mortgage. *King v. Hubbell*, 42 Mich. 597; *Wood v. Weimar*, 104 U. S. 786, 792.

¹ A mortgagee who has forbidden a sale on certain grounds, is estopped from questioning the sale upon other grounds. *Ganong v. Green* (Mich.), 31 N. W. Rep. 461.

² G. S. 1878. ch. 66, § 309. See *Edson v. Newell*, 14 Minn. 228.

Whenever it appears that any property or effects in the hands of the garnishee, belonging to the defendant, are properly mortgaged, pledged, or in any way liable for the payment of any debt due to said garnishee, the plaintiff may be allowed, under a special order of court, to pay or tender the amount due; and the garnishee shall thereupon deliver the property or effects, as hereinbefore provided, to the officer holding the execution, who shall sell the same as in other cases, and out of the proceeds shall repay the plaintiff the amount paid by him to the garnishee for the redemption of such property or effects, with legal interest thereon, and apply the balance upon the execution.¹

Inasmuch as the statute gives the mortgagor a right to redeem after condition broken at any time before the property is sold, in pursuance of a power in the mortgage, or under foreclosure proceedings, his right of redemption, until so extinguished, may be reached by garnishment if the goods are in the possession of the mortgagee, or by levy of execution if they are in the mortgagor's possession.² But if mortgaged property in the rightful possession of the mortgagee be in fact seized under writs of attachment and sold to satisfy judgments against the mortgagor, the mortgagee, in an action against the levying officer for a wrongful conversion of the property, can recover only the value of his interest therein.³

586. Mississippi.—Before sale under a mortgage or deed of trust, the mortgagor is deemed the owner of the legal title, except as against the mortgagee, or trustee and his assigns after breach of condition.⁴ Before breach of condition the mortgagor's interest subject to the mortgage may be seized upon execution; but after breach of condition an execution creditor cannot levy upon and hold the mortgaged property as against the paramount right of the mortgagee or trustee to possession.⁵ The attaching cred-

¹ Gen. Stat. 1878, ch. 66, § 183.

² *Becker v. Dunham*, 27 Minn. 32; *S. C.* 6 N. W. Rep. 406. It is said in this case that it may well be doubted whether mortgaged property in the mortgagee's possession can be reached by levy of execution.

³ *Becker v. Dunham*, *supra*.

⁴ Code 1880, § 1225. See § 427.

⁵ *Butler v. Lee*, 54 Miss. 476. "Before breach of condition the sheriff could hold

possession, because the legal title is deemed to be in the mortgagor or grantor in the deed of trust; and after breach of condition, before a sale under the mortgage or deed of trust, he could hold possession as against all but the holder of the mortgage or deed of trust, because before a sale the mortgagor or grantor in a deed of trust is owner of the legal title, except as against the mortgagee or trustee." Per Campbell, J.

itor may show that the mortgage or deed of trust has been satisfied, and that therefore the property is subject to seizure upon execution.¹

587. In Missouri it seems that the interest of a mortgagor of personal property can be sold on execution only when he has a definite and determined right of possession.² A mortgagor in possession only by the consent of the mortgagee, so that his possession is determinable at the mortgagee's word, has no interest that is subject to levy.³ Neither is his interest subject to sale under execution when the mortgagee is in possession.⁴

An attaching officer cannot interrupt the possession of a mortgagee without first satisfying the mortgage debt.⁵

587 a. Montana Territory.⁶ — Personal property mortgaged may be taken on attachment or execution issued at the suit of a creditor of the mortgagor; but before the property is so taken the officer must pay or tender to the mortgagee the amount of the debt and interest, or must deposit the amount thereof with the county treasurer of the county in which the mortgage is filed, payable to the order of the mortgagee; and when the property then taken is sold under process, the officer must apply the proceeds of the sale as follows: First, to the repayment of the sum paid to the mortgagee, with interest from the date of such payment; and second, the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

588. In Nebraska it is said that a creditor may, by proceedings in attachment, subject the interest of a mortgagor of chattels in the hands of a mortgagee to the payment of his debt. The mortgagee, especially after the debt is due, is entitled to possession as against the execution creditor.⁷ If the mortgagee has taken possession of the mortgaged property, or has the right to do so, a judgment creditor of the mortgagor cannot, without the consent

¹ Helm v. Gray, 59 Miss. 54. And see Boarman v. Catlett, 13 Sm. & M. 149; Henry v. Fullerton, Ib. 631; Harmon v. James, 7 Ib. 111.

² Yeldell v. Stemmons, 15 Mo. 443; Boyce v. Smith, 16 Mo. 317; Dean v. Davis, 12 Mo. 112.

³ King v. Bailey, 8 Mo. 332.

⁴ Sexton v. Monks, 16 Mo. 156.

⁵ Hausmann v. Hope, 20 Mo. App. 193.

⁶ Comp. Stat. 1887, § 1546.

⁷ Stuart v. Alexander, 14 Neb. 37; 14 N. W. Rep. 655.

of the mortgagee, levy upon the property and sell it under execution.¹ The plain, orderly course in such case is by garnishment, whereby such interest may be ordered paid over to the attaching creditor.²

589. Nevada.³ — Mortgaged personal property may be seized under attachment or execution. The possession of mortgaged personal property shall not be taken from the mortgagor or mortgagee unless full payment of the mortgagee's demand be first made, which, if done by the attaching or executing creditor of the mortgagor, shall entitle him to hold such personal property and the possession thereof, under his levy for repayment to him of the amount so paid, in addition to his own individual demand; and any officer executing any execution is hereby authorized to sell such property for the amount of such mortgage demand, in addition to the amount of the execution, and out of the proceeds of sale to first satisfy such mortgage demand. In case of such levy of attachment or execution upon such mortgaged personal property, when the amount of the mortgage demand is not paid to the mortgagee, the officer may expose such property for sale, and may sell the same subject to the rights of the mortgagee under the mortgage, and the purchaser shall take the property subject to such rights and subject to the possession of the parties to the mortgage.

590. New Hampshire.⁴ — Any personal property not exempt from attachment, subject to any mortgage, pledge, or lien, may be attached as the property of the mortgagor, pledgor, or general owner, the attaching creditor or officer paying or tendering to the mortgagee, pledgee, or holder the amount for which said property

¹ *Chicago Lumber Co. v. Fisher*, 18 Neb. 234. Where a mortgage was made of a certain number of steers on the owner's farm, and there was a larger number of steers upon the farm, the mortgage creates no lien upon any specific steers; and the fact that, before the levy of an attachment upon the whole herd, certain steers had been separated from the whole number and claimed under the mortgage, is unavailing as against the attaching creditor, unless it be shown that at the time

the mortgage was executed there was an agreement that it should apply to such steers. *Price v. McComas*, 21 Neb. 195.

² *Faulkner v. Meyers*, 6 Neb. 414; *Chicago Lumber Co. v. Fisher*, *supra*.

³ Stats. 1887, ch. 57.

⁴ G. L. 1878, ch. 224, §§ 17, 18; amended, Laws 1883, ch. 29. See, also, *Hill v. Wiggin*, 31 N. H. 292; *Scott v. Whittemore*, 27 N. H. 309, 320; *Clement v. Little*, 42 N. H. 563; *Putnam v. Osgood*, 52 N. H. 148.

is holden, as ascertained in the mode provided by the following section. Such creditor or officer may demand of the mortgagee, pledgee, or holder an account, on oath, of the amount due upon the debt or demand secured by such mortgage, pledge, or lien, and the officer may retain such property in his custody until the same is given without tender or payment; and if such account is not given within fifteen days after such demand, or if a false account is given, such property may be holden discharged from such mortgage, pledge, or lien;¹ but any person who fails to render an account, or a true account, may be relieved by a bill in equity, brought by him or any party in interest, whenever it shall appear that such failure was caused by fraud, accident, mistake, or misfortune, and that such relief would be just and equitable.

It is also provided² that personal property subject to any mortgage, pledge, or lien may be taken in execution in the same manner that it may be attached, and may be sold in the same manner as other personal property, and the creditor and officer shall have the same right to demand an account of the amount due, and to hold the same, if no account or a false account is given, as in case of an attachment. The proceeds of the sale shall be applied to pay the sum paid or tendered to the mortgagee, pledgee, or holder, and interest, and the residue to the satisfaction of the execution on which the same is holden. The debtor's right to

¹ The account provided for should be a direct and positive statement of the amount of the debt secured. It should be something more than the mortgagee's supposition or opinion. For this reason an account by the mortgagee, stating that "I consider the following claims or demands to be secured," was regarded as insufficient. The purpose of the statute is to enable the creditor or officer to make a tender of the exact sum due upon the mortgage, and thus to preserve the attachment. An account which does not in terms or by reasonable implication do this is insufficient. *Page v. Ordway*, 40 N. H. 253. See, also, as to what is a proper demand, *Gilmore v. Gale*, 33 N. H. 410; *Kimball v. Morrison*, 40 N. H. 117; and notes to § 583, *ante*.

A mistake in the account rendered by the mortgagee, whereby he claims more

than is due, does not necessarily render it false within the meaning of the statute, provided it was rendered in good faith. *Putnam v. Osgood*, 51 N. H. 192; *Melvin v. Fellows*, 33 N. H. 401.

If the mortgage be fraudulent the property may be attached without regard to the mortgage and without calling for an account. *Angier v. Ash*, 26 N. H. 99.

² G. L. 1878, ch. 236, §§ 3-5.

If the property is sold under an attachment without compliance with the statute, the mortgagee may maintain a bill in equity against the sheriff for an accounting for the proceeds. If the validity of the mortgage, by reason of fraud, be put in issue, the court will direct the determination of that issue at law, and will then proceed with the adjustment under the bill. *Tasker v. Lord* (N. H.), 8 Atl. Rep. 823.

redeem such property may be taken on execution, and sold as in other cases, without such payment or tender.

591. New Jersey. — The equity of redemption of a mortgagor of chattels in possession before condition broken may be levied upon and sold by virtue of an execution against the mortgagor.¹ But his interest is not subject to seizure upon execution against him when the mortgagee is in possession or is entitled to possession.² A court of equity, moreover, will not permit a creditor of the mortgagor to levy upon and sell his equity of redemption, when the exercise of this right will destroy or greatly impair the rights of the mortgagee. This would be the case when the property is such that it would be extremely difficult, if not impossible, to follow the chattels sold into the hands of various purchasers. To prevent such irreparable mischief and a multiplicity of suits to recover the property, and to insure the lien of the mortgage from being seriously imperilled, an injunction to restrain the sale will be granted.³

A judgment creditor of a mortgagee may file a bill of discovery against an alleged fraudulent assignee of the mortgage, and upon proof of the fraudulent character of the assignment may have the mortgage fund applied to the payment of the judgment.⁴

592. New York. — The mortgagor's interest before forfeiture is liable to attachment and to sale upon execution by his creditors. The mortgagor in such case has a possessory right coupled with an equity of redemption. His creditors may obtain a lien upon these rights by attachment, and upon execution may sell them subject to the mortgage. The purchaser acquires the mortgagor's interest in the property, and the same right he had to redeem it upon payment of the amount due on the mortgage.⁵ But after

¹ *Doughten v. Gray*, 10 N. J. Eq. 323, 328; *Woodside v. Adams*, 40 N. J. L. 417; *Fox v. Cronan*, 47 N. J. L. 493; 2 Atl. Rep. 444; 4 Ib. 314; *Blauvelt v. Fechtman*, 8 Atl. Rep. 728.

² *Miller v. Pancoast*, 29 N. J. L. 250; *Blauvelt v. Fechtman*, 48 N. J. L. 430.

³ *Smithurst v. Edmunds*, 14 N. J. Eq. 408, 419.

⁴ *Doughten v. Gray*, *supra*.

⁵ *Porter v. Parmly*, 43 How. Pr. 445;

S. C. 34 N. Y. Superior Ct. 398; 52 N. Y. 185; *Hathaway v. Brayman*, 42 N. Y. 322; *Manning v. Monaghan*, 28 N. Y. 585; *Goulet v. Asseler*, 22 N. Y. 225; *Hull v. Carnley*, 11 N. Y. 501; *S. C.* 1 Abb. Pr. 158; *Bailey v. Burton*, 8 Wend. 339; *Otis v. Wood*, 3 Wend. 498; *Randall v. Cook*, 17 Wend. 53; *Bank of Lansingburgh v. Crary*, 1 Barb. 542.

The mortgagor's interest may be levied upon in case the mortgage gives him a

forfeiture the mortgagee's title is absolute, and the mortgagor has no interest in the mortgaged property which is liable to be sold on execution against him.¹

593. In Ohio chattels in possession of the mortgagor may be attached or taken upon execution, although the condition of the mortgage has been broken. The creditor obtains a lien upon the property subject to the rights of the mortgagee, and may redeem the property from him.² The subsequent recovery of the property by the mortgagee in an action of replevin does not defeat the lien; but the creditor may subject the surplus proceeds, after satisfying the mortgage, to the payment of his judgment, although after the attachment or levy, and before the creditor has commenced proceedings to reach the surplus, the mortgagor executed an assignment of the surplus to another.³ In such action of replevin by the mortgagee against an officer holding the property under legal process, the creditor may cause himself to be made a party defendant, and may by counter-claim set up and enforce his right to equitable relief, or for an account.⁴

594. Rhode Island.⁵ — Personal estate when mortgaged and

right of possession until payment of the mortgage debt be demanded. *Hall v. Sampson*, 35 N. Y. 274; *Hathaway v. Brayman*, 42 N. Y. 322. If the mortgage debt is payable on demand, and the mortgagor has the right of possession until default, this right continues until payment is demanded; and till then his interest is subject to execution. *Lyman v. Bowe*, 12 Daly, 281.

A levy of execution upon the mortgagor's interest deprives him of his entire interest, and not merely of an interest equal to the amount of the judgment. Therefore, if the mortgagee replevy the goods from the constable, the mortgagor cannot maintain an action against the mortgagee to recover any balance that may remain after deducting the amount of the mortgage and of the execution held by the constable; but the constable is entitled to recover of the mortgagee the full amount of the mortgagor's special interest in the goods, and not merely

the amount named in the execution. The constable's possession excludes that of the mortgagor. *Michelson v. Fowler*, 27 Hun, 159. See *Buck v. Remsen*, 34 N. Y. 383.

¹ *Champlin v. Johnson*, 39 Barb. 606; *Hall v. Samson*, 19 How. Pr. 481; *Baltes v. Ripp*, 3 Keyes, 210; *S. C. 1 Abb. Dec.* 78; *Fairbanks v. Bloomfield*, 5 Duer, 434; *Powers v. Elias*, 21 J. & S. 480.

² *Carty v. Fenstermaker*, 14 Ohio St. 457; *Morgan v. Spangler*, 20 Ib. 38; *Kelly v. Purcell* (Ohio, 1880), 8 Am. L. Rec. 705; *Lindemann v. Ingham*, 36 Ohio St. 1, 9.

³ *Carty v. Fenstermaker*, *supra*.

⁴ *Morgan v. Spangler*, *supra*; *Armstrong v. McAlpin*, 18 Ohio St. 184. For construction of statute see *Arnold v. Chapman*, 13 R. I. 586.

⁵ G. S. 1872, p. 460, ch. 197, §§ 4-8; p. 495, ch. 212; §§ 4-8; P. S. 1882, ch. 208, §§ 4-8; ch. 223, §§ 4-8.

in the possession of the mortgagor, and while the same is redeemable at law or in equity, may be attached on mesne process against the mortgagor, or execution may be levied upon it in the same manner as upon his other personal estate.¹

When attached or levied on, such mortgaged estate may be sold, upon the application of the mortgagee, or of either of the parties to the suit, in the manner provided for the sale of perishable goods and chattels when attached on mesne process.

Upon any such sale the officer shall first apply so much of the proceeds of the sale as may be necessary to pay the amount for which the said property was mortgaged, with such deduction for interest for the anticipated payment, or allowance for damages for such anticipated payment, as may be allowed by the court or judge directing the sale; and the officer shall hold only the balance, for the purposes of the attachment or execution.

The plaintiff in any such attachment or levy may redeem the mortgaged estate in the same manner as the mortgagor might have done; and in case of such redemption the plaintiff shall have the same lien on the property for the amount paid by him, with interest, as the mortgagee had.

If the mortgage be not redeemed by the plaintiff, or sold as before mentioned, before the redemption expires, the attachment shall become void.

595. In South Carolina the mortgagee of a chattel is the legal owner of it, and the interest of a mortgagor of a chattel is not subject to levy and sale upon execution,² though it seems that the practice has been to make levies and sales in such cases.³

596. In Tennessee equitable interests in chattels are not subject to execution.⁴ A creditor of a pledgor cannot take upon an execution or attachment the property held in pledge, without first discharging the debt for which it is held.⁵

¹ Mortgaged personalty, lawfully attached under this statute, cannot be replevied by the mortgagee. *Arnold v. Chapman*, 13 R. I. 586.

² *McKnight v. Gordon*, 13 Rich. (S. C.) Eq. 222.

³ *Carnes v. Apperson*, 2 Sneed, 562.

⁴ *First Nat. Bank v. Pettit*, 9 Heisk.

⁵ *Simonds v. Pearce*, 31 Fed. Rep 137; *Levi v. Legg*, 23 S. C. 282. (Tenn.) 447.

597. Texas. — Goods and chattels pledged, assigned, or mortgaged as security for any debt or contract, may be levied upon and sold on execution against the person making the pledge, assignment, or mortgage subject thereto; and the purchaser shall be entitled to the possession when it is held by the pledgee, assignee, or mortgagee, on complying with the conditions of the pledge, assignment, or mortgage.¹

597a. Utah Territory. — Personal property mortgaged may be taken on attachment, if any legal cause for attachment exist, or on execution issued at the suit of a creditor of the mortgagor; but before the property is so taken, the officer must pay or tender the mortgagee the amount of the mortgage debt and interest at the place where by its terms it is made payable, if such place is within this territory. If it specifies no place of payment, or if it be payable without this territory, then he must deposit the amount thereof with the county treasurer of any county wherein the mortgage is recorded, payable to the mortgagee or his order.²

598. Vermont.³ — Any personal property not exempt from attachment, subject to any mortgage, pledge, or lien, may be attached, taken on execution, and sold in the same manner as other personal property, except as is herein otherwise provided, as the property of the mortgagor, pledgor, or general owner.

The officer making such attachment, or taking such property on an execution, may demand of the mortgagee, pledgee of such property, or the holder of such lien, an account in writing and under

¹ The mortgagee may sequester the property in a suit against the mortgagor to which the execution purchaser is also made a party. *Sparks v. Pace*, 60 Tex. 298; R. S. 1879, art. 2296, p. 336.

That mortgaged property may be taken on execution subject to the mortgage, although the mortgage contains a power authorizing the mortgagee to sell upon default, see *Wootton v. Wheeler*, 22 Tex. 338. But it is to be understood that the mortgagee, or, in case of a trust deed, the trustee or *cestui que trust*, is not in possession. *Raysor v. Reid*, 55 Tex. 266.

If the mortgagee's security is endangered by the proceedings under the levy,

the remedy is an appeal by an original suit invoking the equitable powers of the court. The question of priority of liens will not be determined in a proceeding for the trial of the right of property. *Raysor v. Reid*, *supra*.

Property in the possession of the mortgagee may be attached as against the mortgagor; but unless the mortgage be first paid, the sheriff cannot take possession, but the levy must be made in accordance with R. S. §§ 167, 2292, 2296. *Stiles v. Hill*, 62 Tex. 429.

² Laws 1884, ch. 21, § 6.

³ Laws 1880, p. 41, No. 33; R. L. 1880, §§ 1180-1185.

oath of the amount due upon the debt secured by such mortgage, pledge, or lien, and the officer may retain such property in his custody until the same is given, without tender or payment; and if such mortgage, pledgee, or holder resides in this state, he shall render such account within fifteen days after such demand; and if he resides without this state, he shall render such account within thirty days after receiving a demand in writing to render such account; and if such account is not rendered within the time aforesaid, or if a false account is rendered, such property may be holden and sold, discharged from such mortgage, pledge, or lien.

If such debt is due at the time of rendering such account, the creditor so attaching or causing to be taken on execution such property may, within ten days after such account is rendered, pay or tender the amount so rendered to the mortgagee, pledgee, or holder of such lien, and hold and sell such property free and clear of such mortgage, pledge, or lien.

If such debt is not due at the time of rendering such account, but becomes due before the time fixed by the officer making such attachment or levy of execution for the sale of such property, such creditor, within ten days after the debt becomes due and before the sale, may pay or tender the amount thereof to such mortgagee, pledgee, or holder of such lien, and hold and sell such property as is provided in the preceding section.

If such creditor shall pay or tender such debt as is provided in the two preceding sections to the mortgagee, pledgee, or holder of such lien, he shall be subrogated to all the rights of such mortgagee, pledgee, or holder, and may cause the same to be sold in the same manner that unincumbered personal property may now be sold on *mesne* or final process, and the proceeds of such sale shall be applied first in payment of the sum paid by such creditor to such mortgagee, pledgee, or holder; second, to satisfy such execution.¹

If the debt secured by such mortgage, pledge, or lien is not due at the time fixed by such officer for the sale of such property, such creditor may offer to pay such debt to the mortgagee, pledgee, or

¹ If the property is part attachable and part exempt, and the creditor obtains an execution and delivers it with the note and mortgage to an officer who takes the property into his possession, the mortgagor cannot maintain replevin for that which is exempt. *Denno v. Nash* (Vt.), 14 Atl. Rep. 459.

holder of such lien ; and if such mortgagee, pledgee, or holder shall refuse to receive the same, such property may be sold, subject to such mortgage, pledge, or lien, and the purchaser of such property at such sale shall take by such sale all the right, title, and interest that the mortgagor, pledgor, or general owner of said property had in and to the same, and shall be subject to the same duties and obligations in regard to such property as the mortgagor, pledgor, or general owner was under at the time of such attachment or taking on execution.

It is further provided in Vermont that when a mortgagor of personal property is summoned in an action as trustee¹ of the mortgagee of such property, the plaintiff may direct the officer having the writ in such action to attach the interest of such mortgagee. The officer, when so directed, shall attach such interest by leaving a copy of the writ in the town clerk's office where the mortgage is recorded, with his return thereon, describing the property and the interest of the mortgagee therein ; and the town clerk shall enter upon the margin of the record of such mortgage a statement that the interest of the mortgagee is attached, and shall make such other record and entry of such attachment as he is now required by law to make where property is attached by copy.

The property so attached shall be holden to satisfy any execution issuing upon a judgment rendered against the trustee in the original action, or in an action on a judgment rendered against the trustee in the original action, in the same manner and to the same extent that property attached as the property of the defendant in an action, and taken into the actual possession of the officer making the attachment, is held to satisfy an execution against such defendant.

The mortgagee whose interest is so attached shall not sell or dispose of such property while the attachment is in force, or while the liability of the trustee is undetermined or continues.

Property so attached may be sold upon any execution issuing by reason of a judgment rendered against the trustee, either in the original action or in an action on a judgment rendered in the original action, and the title and interest of the mortgagor, mortgagee, or other person, to and in such property, shall pass to the purchaser of the property at such sale.

¹ Laws 1880, p. 42, No. 34 ; R. L. 1880, §§ 1103-1109.

When any such action is pending in the county or Supreme Court, if the trustee files with the clerk of such court a bond to the plaintiff in such action in a penal sum equal to the amount that the officer is directed to attach property in the writ, with sufficient sureties to be approved by such clerk, conditioned that such trustee will pay the judgment rendered against him in such action, and that he will pay such sum as he may be ordered by the court to pay the plaintiff at any future time or times, and also a bond to the defendant in such action in a penal sum double the amount of the mortgage debt, with such sureties to be approved of as aforesaid, conditioned that he will pay the balance due upon such mortgage after paying such judgment and making such payments, and that, in case he is discharged as trustee, he will pay the amount secured by mortgage, he may sell such property the same as if it had not been mortgaged or attached ; and the purchaser of such property shall hold the same released from such mortgage and attachment.

When any such action is pending in the county or Supreme Court, if the mortgagee files with the clerk of such court a bond in the penal sum equal to the amount that the officer is directed to attach property to secure in the writ in such action, with sufficient sureties to be approved by such clerk, conditioned that he will pay the judgment that may be rendered against him in such action, such trustees shall be discharged, and the attachment shall be dissolved.

Personal property not exempt from attachment, which is incumbered by a chattel mortgage, may, notwithstanding such mortgage, be attached on mesne process and sold on execution in the same manner as unincumbered personal property in any action against the mortgagor and mortgagee for the recovery of a debt or demand for which both mortgagor and mortgagee are adjudged holden ; and the whole interest in such property shall pass to the purchaser at such sale.

599. Washington Territory.¹ — The interest of the mortgagor, subject, however, to the lien of the mortgagee, may be sold under any process of law issuing out of any district court or justice of the peace court in this territory : provided, however, that if the party who has said mortgage reside in this territory, or has an

¹ G. L. 1879, p. 105, § 5 ; Code 1881, § 1990.

agent therein, and the same is known to the officer executing such process, he shall serve upon him or his agent personally, or by mailing to him or to his agent if their post-office is known, a notification of the intended sale, at the time such mortgaged property is seized under said process, or within five days thereafter.¹ Said property shall not be sold within less than thirty days after its seizure, and the officer executing such process must post in three public places, near the place where the said property is to be sold, a notice of the time and place of such sale, at the time he seizes said property under said process.

600. In Wisconsin a mortgagor's creditor may levy upon his interest in the mortgaged property, and sell it subject to the rights of the mortgagee. He cannot levy upon the property itself, but only upon the mortgagor's interest therein. He cannot deprive the mortgagee of possession if he be in possession, nor can he dispose of the property regardless of the mortgagee's rights. He cannot sell the property in parcels, but must sell it in bulk, subject to the mortgage; and the officer should retain possession until the purchaser pays the mortgage, and then he may apply the surplus upon the execution.² It is only when the mortgagor has the right of possession for a definite period of time that his interest may be attached or seized and sold upon execution subject to the mortgage.³

It is provided by statute⁴ that whenever it shall appear, upon the trial of any action against a sheriff, coroner, constable, or other officer for the recovery of the possession of personal property or the value thereof, that the defendant obtained the possession of such property by virtue of an execution or writ of attachment against the property of a person not a party to such action, from whom the plaintiff claims to have derived his right by a mortgage, and that such property was taken by the officer from the

¹ The provisions relating to giving notice to the mortgagee by the sheriff, when levying upon the mortgaged chattels under process against the mortgagor, are mandatory, but do not affect the validity of the sale. *Byrd v. Forbes*, 13 Pac. Rep. 715.

² *Cotton v. Marsh*, 3 Wis. 221; *Frisbee*

v. Langworthy, 11 Wis. 375; *Cotton v. Watkins*, 6 Wis. 629.

³ *Saxton v. Williams*, 15 Wis. 292.

⁴ R. S. 1878, ch. 105, § 2319.

As to evidence of identity of the goods where the mortgagor has remained in possession and sold goods and replenished the stock, see *Rhodes v. Stephens*, 61 Wis. 388.

possession of the defendant in such execution or attachment, or from premises occupied or controlled by him, and it shall be alleged in the answer of the defendant that such mortgage was fraudulent as to the creditors of the mortgagor, then the burden of proof shall be upon the plaintiff to show that such mortgage was given in good faith and to secure an actual indebtedness and the amount thereof.

CHAPTER XIII.

REMOVAL, CONCEALMENT, AND SALE OF MORTGAGED PROPERTY :

601-631.

601. *In general.* — A provision against a sale or removal of the mortgaged property is frequently inserted in mortgages to the effect that, if the mortgagor shall attempt to sell the property, or any part of it, or to remove it, without the written consent of the mortgagee, the latter may take immediate possession of it. If such a provision be violated by a sale or mortgage of the property the mortgagee may take possession, and may maintain it in the absence of any payment or tender of the amount due on the mortgage.¹

Other similar provisions are frequently inserted in mortgages with the same general purpose to protect the mortgagee and enable him to take possession, if his protection require it, before the maturity of the mortgage debt. Such, for instance, is the provision enabling the mortgagee to take possession whenever he shall deem himself insecure.

A court of equity, before default or before the mortgagee can proceed at law, may interfere to restrain the removal of mortgaged chattels beyond the jurisdiction of the court. The ground of jurisdiction in equity in such case is the prevention of injury to the present or future rights of the mortgagee, for the protection of which there is no appropriate or adequate remedy at law.² But the mortgagor is not to be hindered in the legitimate use of the property, and a mere temporary removal of it out of the state, accompanied by an honest intention to return it before the matu-

¹ Howard v. Chase, 104 Mass. 249.

Where such a provision was contained in a mortgage by a lessee to his lessor, and the lessee upon receiving notice to quit leaves the premises, taking with him the mortgaged goods, and the mortgagee stands by and makes no objection, by such acquiescence he loses his right to insist on a forfeiture for the removal. But a court

of equity, as a condition of enjoining the enforcement of such mortgage, may require the mortgagor to execute a new mortgage precisely like the old, to be recorded in the county to which the mortgaged property was removed. Grinlee v. Rockhill (N. J.), 13 Atl. Rep. 609.

² § 450.

riety of the debt, and without any intention to embarrass or impair the rights of the mortgagee, will not authorize the interference of a court of equity. Thus, if a mortgagor drive a horse and wagon, the subject of the mortgage, into a neighboring state, for the purpose of making a brief visit, with the manifest intention of returning before the law day of the mortgage, without further proof that the rights of the mortgagee will be endangered, there is no ground for such equitable interference.¹

But in addition to such rights to protection in equity, and in addition to any such provisions which may be made in the contract itself for the protection of the mortgagee, it has been found necessary to protect him by general enactments respecting the removal, concealment, and sale of the mortgaged property by the mortgagor. Accordingly, in most of the states and territories there are statutes making the removal or sale of the mortgaged property without the consent of the mortgagee a criminal offence, punishable by fine or imprisonment. These statutes, however, are so different in their provisions, and even in their scope, that no general synopsis of them can be satisfactorily made; and therefore the statutes are stated in full for each state.

602. Alabama.²—Any person who sells or conveys any personal property upon which he has given a written mortgage, lien, or deed of trust, and which is then unsatisfied in whole or in part, without first obtaining the consent of the lawful holder thereof to such sale or conveyance, must on conviction be fined not more than five hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county for not more than six months, one or both, at the discretion of the jury.

602 a. Arizona Territory.—The person making any such instrument shall not remove the property pledged from the county, nor otherwise sell or dispose of the same, without the consent of the mortgagee; and in case of any violation of the provision of this section, the mortgagee shall be entitled to the possession of the property, and to have the same then sold for the payment of his debt, whether the same has become due or not.³

¹ Walker v. Radford, 67 Ala. 446.

³ R. S. 1887, § 2370.

² Code 1886, § 3836.

603. *Arkansas*.¹— Any person or persons who shall remove beyond the limits of this state, or of any county wherein the lien may be recorded, property of any kind upon which a lien shall exist, by virtue of a mortgage, deed of trust, or by contract of parties, or by operation of law, or who shall sell, barter, or exchange, or otherwise dispose of any such property without the consent of the person or persons in whose favor such lien shall have been created, or exists by law, or who shall secrete the same or any portion thereof, shall be deemed guilty of felony, and subject to an indictment, and upon conviction thereof shall be sentenced to hard labor in the jail and penitentiary-house of this state for a period of not less than one nor more than two years, at the discretion of the jury trying the same.²

604. *California*.³— If a mortgagor voluntarily removes or permits the removal of the mortgaged property from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.

Every person who, after mortgaging any property except locomotives, engines, rolling stock of a railroad, steamboat machinery in actual use, and vessels, voluntarily removes or permits the removal of the mortgaged property from the place where it was situated at the time it was mortgaged, without the written consent of the mortgagee, with intent to deprive the mortgagee of his interest therein, is guilty of a misdemeanor.⁴

605. *Colorado*.⁵— A sale, transfer, or incumbrance of the mortgaged property by the mortgagor during the existence of the mortgage is deemed a larceny of such property, unless at the time of making such sale, transfer, or incumbrance such mortgagor shall fully advise the person to whom it may be made of the fact

¹ Dig. of Stats. 1884, § 1693.

² A cropper on shares who has mortgaged his interest, and afterwards has sold the property contrary to the statute, is liable to the penalty. *Beard v. State*, 43 Ark. 284.

To render one guilty under the statute, it is not necessary that the jury should find that the mortgagor sold the property

with the felonious intent to deprive the mortgagee of his debt. *Beard v. State*, *supra*.

³ Codes and Stats. 1876, § 7966.

⁴ Penal Code, § 537; Stats. 1887, ch. 77.

⁵ G. S. 1883, §§ 168-171; amended, Laws 1887, p. 76.

of the prior incumbrance and mortgage, and also first fully apprise the mortgagee of the intended sale, giving him the name and place of residence of the party to whom the sale, transfer, or incumbrance is to be made.

If the mortgagor transfers, conceals, or carries away or disposes of the mortgaged property contrary to the provisions of the mortgage, and without the written consent of the mortgagee, he shall be deemed guilty of the larceny of such property, and upon conviction be punished accordingly.

Any person, having conveyed any article of personal property to another by mortgage, who shall, during the existence of the lien or title created by such mortgage, sell the said personal property to a third person for a valuable consideration, without informing him of the existence and effect of such mortgage, shall forfeit and pay to such purchaser twice the value of such property so sold, which forfeiture may be recovered in an action of debt in any court having jurisdiction thereof.

606. Connecticut.¹— Every person who shall, with intent to place mortgaged personal property beyond the control of the mortgagee, remove or conceal, or aid or abet the removal or concealment of the same, or any mortgagor of such property who assents to such removal or concealment, shall be fined not more than five hundred dollars, or imprisoned not more than six months. And every mortgagor of personal property who shall sell or convey the same, or any part thereof, without the written consent of the mortgagee, and without informing the person to whom he sells or conveys that the same is mortgaged, shall be fined not more than one hundred dollars, or imprisoned not more than six months.

607. Dakota Territory.²— Every mortgagor of personal property or his legal representatives, who while his mortgage thereof remains in force and unsatisfied wilfully destroys, removes, conceals, sells, or in any manner disposes of or materially injures the property or any part thereof covered by such mortgage, without the written consent of the then holder of such mortgage, shall be deemed guilty of felony, and shall, upon conviction, be punished by imprisonment in the territorial prison for a period not exceed-

¹ G. S. 1888, § 1446.

² R. C. 1883; § 579 of Penal Code.

§§ 608-610.] REMOVAL, CONCEALMENT, AND SALE

ing three years, or in the county jail not exceeding one year, and by fine not exceeding five hundred dollars.

If the mortgagor voluntarily removes or permits the removal of the mortgaged property from the county in which it was situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.¹

608. Delaware.²— If any mortgagor shall, without the consent of the mortgagee, remove the mortgaged property from the county where it is situated, or in which it was at the time of making the mortgage, he shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined in a sum equal to the value of the property removed, and shall also be imprisoned for a term not exceeding one year.

609. Florida.³— Whoever, with a fraudulent intent to place mortgaged personal property beyond the control of the mortgagee, removes or conceals or aids or abets in removing or concealing the same, and any mortgagor of such property who assents to such removal or concealment, shall be punished by fine not exceeding double the value of the property, or by imprisonment in the county jail not exceeding one year. If a mortgagor of personal property sells or conveys the same, or any part thereof, without the written consent of the mortgagee, and without informing the person to whom he sells or conveys that the same is mortgaged, he shall be punished by fine not exceeding one hundred dollars, and by imprisonment in the county jail not exceeding one year.

610. Georgia.⁴— No person, after having executed a mortgage deed to personal property, shall be permitted to sell or otherwise dispose of the same with intent to defraud the mortgagee, unless the consent of the mortgagee be first obtained, before payment of the indebtedness for which the mortgage deed was executed; and if any person shall violate the provisions of this

¹ R. C. 1883; § 1752 of Civil Code.

² Laws 1877, ch. 477, § 4.

³ Dig. Laws 1881, p. 390.

⁴ Code 1873, §§ 4600, 4601; amended, Laws 1887, p. 37, No. 310. These provisions rendering penal the wrongful sale of

mortgaged property are extended to liens for rent and advances made upon crops. Acts 1875, p. 26; Acts of 1876, p. 114; Supplement to Code 1878, § 448. As to venue for trial, see Laws 1887, p. 37, No. 292.

section, and loss thereby is sustained by the holder of the mortgage, the offender shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine in double the sum or debt which said mortgage was given to secure;¹ and upon failure to pay said fine immediately, the person so convicted shall be confined in the chain-gang or the county jail for a period of not more than twelve months. When the fine has been imposed and collected, one half shall be paid to the holder of the mortgage, and the payment shall extinguish the debt to secure which the mortgage was executed, and the remaining half shall be paid over to the county treasury of the county in which said conviction was had.

610 a. Idaho Territory.²—If the mortgagor of any property mortgaged in pursuance of the provisions of this chapter, while such mortgage remains unsatisfied in whole or in part, wilfully removes from the county or counties where the mortgage is recorded, destroys, conceals, sells, or in any manner disposes of the property mortgaged, or any part thereof, without consent of the holder of said mortgage, he is guilty of larceny, and such sale or transfer is void.

611. Illinois.³—Any person having mortgaged any personal property who shall, during the existence of the title or lien created by such instrument, sell the same or any part thereof to another person for a valuable consideration without informing him of the existence of such conveyance, shall forfeit and pay to the purchaser twice the value of the property so sold, which sum may be recovered by such purchaser in an action of debt, in any court of competent jurisdiction, or before a justice of the peace, if within his jurisdiction.⁴ Any person having so conveyed any personal property who shall, during the existence of such title or lien, sell,

¹ Though the mortgagor had other property, there is still a violation of the law. *Coleman v. Allen*, 5 S. E. Rep. 204. A laborer, under a contract that he should have a share of the net profits of a crop, has no interest in the crop that he can mortgage, except his share of the net crop. If he makes a mortgage of his share of the crop, and the landlord sells the entire crop under the contract, the

laborer is not liable to the penalties of the statute. The gist of the offence is a sale with intent to defraud. *Cody v. State*, 69 Ga. 743.

² R. S. 1887, § 3397.

³ R. S. 1874, and R. S. 1880, ch. 95, §§ 6, 7.

⁴ The sale is void, and the mortgagor cannot recover the price. *Potts v. McPherson*, 21 Ill. App. 121.

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transfer, conceal, take, drive, or carry away, or in any manner dispose of such property or any part thereof, or cause or suffer the same to be done without the written consent of the holder of such incumbrance, shall be guilty of a misdemeanor, and on conviction may be fined in a sum not exceeding twice the value of the property so sold or disposed of, or confined in the county jail not exceeding one year, at the discretion of the court.

612. Indiana.¹—A mortgagor of personal property, in possession of the same, who, without the consent of the owner of the claim secured by the mortgage, removes any of the property out of the county where it was situated at the time it was mortgaged, or secretes, or converts the same or any part thereof to his own use, or sells the same or any part thereof to any person, without informing him of the existence of such mortgage, shall be fined in any sum not more than two hundred dollars nor less than five dollars.²

613. Iowa.³—If any mortgagor of personal property, while his mortgage of it remains unsatisfied, wilfully destroy, conceal, sell, or in any manner dispose of the property covered by such mortgage, without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny and be punished accordingly.

An indictment under this statute must aver that the mortgage was unsatisfied at the time of the alleged offence.⁴

614. Kansas.⁵—Any mortgagor of personal property who shall injure, destroy, sell, or dispose of such property or any part thereof, for the purpose of defrauding the mortgagee, or his or her assigns, or shall conceal such property or any part thereof with

¹ Acts 1879, p. 161, ch. 68.

² R. S. 1881, § 1954.

³ Code 1873, and Rev. Code 1880, § 3895.

It is competent for the mortgagor to show that, after the execution of the mortgage, the mortgagee gave him permission by parol to sell the mortgaged property. Such evidence does not contradict the written mortgage. *Walker v. Camp*, 63 Iowa, 627.

The purchaser of mortgaged chattels is not criminally liable. *McDonald v. Norton*, 72 Iowa, 652.

⁴ *State v. Gustafson*, 50 Iowa, 194. See, also, *State v. Julien*, 48 Iowa, 445, as to circumstances under which a removal and sale do not constitute an offence indictable in the county where the mortgage was executed.

⁵ *Dassler's Compiled Laws* 1885, § 2202.

the intent to hinder, delay, or defraud such mortgagee, or his or her assigns, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period not to exceed six months, or by a fine of not less than fifty dollars or more than five hundred dollars, or by both such fine and imprisonment.

614 a. Maine.¹—Whoever, with the fraudulent intent to place mortgaged personal property beyond the control of the mortgagee, removes or conceals, or aids or abets in removing or concealing such removal or concealment, shall be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year.

614 b. Maryland.²—A mortgagor of personal property, in possession of the same, who, without the consent of the owners of the claim secured by said mortgage first had and obtained in writing from said owner, and with intent to defraud, removes any of the property mortgaged out of the county or city where it was situated at the time it was mortgaged, or secretes, destroys, or sells the same, shall be deemed guilty of a misdemeanor, and on indictment therefor, and conviction thereof, shall be fined not more than five hundred dollars, or imprisoned in jail not more than six months, or both, in the discretion of the court.

615. Massachusetts.³—Whoever, with a fraudulent intent to place mortgaged personal property beyond the control of the mortgagee, removes or conceals, or aids or abets in removing or concealing the same, and any mortgagor of such property who assents to such removal or concealment shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the jail not exceeding one year. A mortgagor of personal property who sells or conveys the same or any part thereof without the written consent of the mortgagee, and without informing the person to whom he sells or conveys that the same is mortgaged, shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the jail not exceeding one year.

An indictment under this statute is sufficient which describes

¹ R. S. 1883, ch. 126, § 4.

² Laws 1884, ch. 202.

³ G. S. 1860, ch. 161, §§ 61, 62; P. S. 1882, ch. 103, §§ 69, 70.

the property as a large quantity of dry goods of a certain value, especially if it be alleged that a more particular description cannot be given; the punishment not depending upon the amount or value of the property.¹

Any person who participates in the offence is a principal, there being no distinction in misdemeanors between principal and accessory before the fact. Therefore, in an indictment for removing and concealing mortgaged property, an allegation of aiding and abetting is superfluous.²

In order to justify a sale it is not necessary that the mortgagor should both have the written consent of the mortgagee and shall have informed the purchaser of the existence of the mortgage; but he may sell either with such consent, or after giving such information,³ without incurring the penalty of the statute.

No action lies to recover the price of property sold in violation of the statute and returned by the purchaser.⁴ But the purchaser may show that the sale was made with the oral consent of the mortgagee, who is thus barred of his right to set up his mortgage against the purchaser's title.⁵

616. Michigan.⁶ — Any person who shall fraudulently embezzle, remove, conceal, or dispose of any goods or chattels mortgaged, leased, or let to him by any mortgage, written lease, or other instrument in writing intended to operate as a mortgage or lease, or any personal property of another in his possession under a mortgage or contract of purchase not yet fulfilled, and any person in possession of such goods or chattels knowing them to be subject to such lease, contract of purchase, or mortgage, who shall so embezzle, remove, conceal, or dispose of the same, with the intent to injure or defraud the lessor, mortgagee, or owner thereof, which shall be of the value of twenty-five dollars or more, shall be deemed guilty of a felony, and shall upon conviction thereof be punished by imprisonment in the state prison not more than two years, or by fine not more than two hundred and fifty dollars, or

¹ Commonwealth v. Strangford, 112 Mass. 289.

² Commonwealth v. Wallace, 108 Mass. 12.

³ Commonwealth v. Damon, 105 Mass. 580.

⁴ Bryant v. Pollard, 10 Allen, 81.

⁵ Stafford v. Whitcomb, 8 Allen, 518; Shearer v. Babson, 1 Ib. 486; Pratt v. Maynard, 116 Mass. 388; and see Draper v. Saxton, 118 Mass. 427.

⁶ Acts 1887, p. 168, No. 157.

by imprisonment in the county jail not more than six months. If the property shall not be of the value of twenty-five dollars, the person thus offending shall be deemed guilty of a misdemeanor, and be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail not exceeding three months, or both, in the discretion of the court.

617. Minnesota.¹ — If any person having conveyed any article of personal property by mortgage shall, during the existence of the lien or title created by such mortgage, sell, transfer, conceal, take, drive, or carry away, or in any way or manner dispose of said property, or any part thereof, with intent to defraud, or cause or suffer the same to be done without the written consent of the mortgagee of said property, he shall be deemed guilty of a misdemeanor, and shall be liable to indictment; and on conviction thereof shall be punished by a fine of not less than twice the value of the property so sold or disposed of, or confined in the county jail not exceeding one year, or both, at the discretion of the court, and until the fine and all costs of such prosecution are paid. The fact of sale without the written consent of the mortgagee or his assignee is *primâ facie* evidence of a fraudulent intent on the part of the vendor.

618. Mississippi.² — If any person shall move or cause to be removed to any place beyond the jurisdiction of this state any personal property which shall, at the time of such removal, be under written pledge, or mortgage, or deed of trust, or lien by judgment in this state, with intent to defraud the pledgee, mortgagee, trustee, *cestui que trust*, or judgment creditor, said person shall be deemed guilty of a misdemeanor; and upon conviction thereof, before a court of competent jurisdiction, shall be fined not more than one thousand dollars, or imprisoned in the county jail not more than twelve months, or punished by both such fine and imprisonment, at the discretion of the court.

¹ G. S. 1878, ch. 39, § 14; amended, Laws 1883, ch. 23. An intent to defraud the mortgagee is an essential ingredient of the offence; so that an indictment alleging no intent to defraud, except an intent to defraud a person other than the

mortgagee, is fatally defective. *State v. Ruhnke*, 27 Minn. 309.

A growing crop is personal property within the meaning of the statute. *State v. Williams*, 32 Minn. 537. As to the indictment, see *State v. Williams*, *supra*.

² Code 1880, §§ 2908, 2909.

Any person who shall remove or cause to be removed, or aid or assist in removing, from the county in which it may be, any personal property which may be the subject of a pledge, mortgage, deed of trust, lien of a lessor of lands, or lien by judgment or otherwise, of which such party has notice, without the consent of the holder of such incumbrance or lien, or who shall conceal or secrete such property, and shall not immediately discharge such incumbrance or lien, shall, upon conviction, be imprisoned in the county jail not more than one year, or be fined not exceeding the value of such property, or both.¹

619. Missouri.² — Every mortgagor or grantor in any chattel mortgage, or trust deed of personal property, who shall sell, convey, or dispose of the property mentioned in said mortgage or trust deed, or any part thereof, without the written consent of the mortgagee or beneficiary, and without informing the person to whom the same is sold or conveyed that the property is mortgaged or conveyed by such deed of trust, or who shall injure or destroy such property or any part thereof, or aid or abet the same, for the purpose of defrauding the mortgagee, trustee, or beneficiary, or his heirs or assigns, or shall remove or conceal, or aid or abet in removing or concealing, such property or any part thereof, with intent to hinder, delay, or defraud such mortgagee, trustee, or beneficiary, his heirs or assigns, shall be deemed guilty of a misdemeanor.

620. Montana Territory.³ — Any person having conveyed any goods, chattels, or personal property to another, by mortgage, who shall, during the existence of the lien or title created by such mortgage, sell the said goods, chattels, or personal property, or any part thereof, to a third person, for a valuable consideration, without informing him of the existence and effect of such mortgage, shall forfeit and pay to the purchaser twice the value of such property so sold, which forfeiture may be recovered in an action of debt in any court having jurisdiction thereof.

Any mortgagor, or agent, servant, or employee of any mort-

¹ The offence is not committed by a mere sale to one who afterwards removes the property from the county. The offence must be completed by the act of the party, and not by a new agency. *Polk v. State*, 4 So. Rep. 540.
² R. S. 1879, § 1341.
³ Compiled Stats. 1887, §§ 1553, 1554.

gagor of personal property, who shall, during the time such mortgage remains in force and virtue, destroy, conceal, sell, or otherwise dispose of the whole or any part of the property mortgaged, or who shall remove the same or any part thereof from the county in which said mortgage is filed, without the written consent of the mortgagee, his legal representatives or assigns, shall be deemed guilty of a misdemeanor; and on conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, at the discretion of the court.

621. Nebraska.¹— Any person who, after having conveyed any article of personal property to another by mortgage, shall, during the existence of the lien or title created by such mortgage, sell, transfer, or in any manner dispose of the said personal property, or any part thereof so mortgaged, to any persons or body corporate, without first procuring the consent of the mortgagee of the property to such sale, transfer, or disposal, or shall remove, permit or cause to be removed, said mortgaged property, or any part thereof, out of the county within which such property was at the time such mortgage was given on it, with intent to deprive the mortgagee of his security, without first obtaining the consent in writing of the mortgagee of such property to such removal, shall be deemed guilty of a felony, and on conviction thereof shall be imprisoned in the penitentiary for a term not exceeding ten years, and be fined in a sum not exceeding one thousand dollars.

622. New Hampshire.²— No mortgagor of personal property shall sell or pledge any property by him mortgaged, without the consent of the mortgagee in writing upon the mortgage, and on the margin of the record thereof, in the office where it is recorded.

No mortgagor shall execute any second or subsequent mortgage of personal property while the same is subject to a previously existing mortgage given by such mortgagor, unless the fact of

¹ Compiled Stats. 1885, ch. 12, §§ 9, 10. intent to defraud. *State v. Hurds*, 19 Neb. 316.
It is not necessary that the indictment
should allege that the sale was made with

² G. S. 1878, ch. 137, §§ 13-16.

the existence of such previous mortgage is set forth in the subsequent mortgage.

If any mortgagor shall be guilty of any offence against either of the above provisions, he shall be fined double the value of the property so wrongfully sold, pledged, or mortgaged, one half to the use of the party injured, and the other half to the use of the county.

In a prosecution for the sale of mortgaged property, the value of the property sold, at the time of the sale, must be alleged in the indictment and found by the jury, just as in a prosecution for larceny.¹

Under a statute requiring the written consent of the mortgagee to justify a sale of the mortgaged property by the mortgagor, his verbal consent is no answer to an indictment under the statute against the mortgagor for making a sale contrary to statute.²

If the mortgagor sells the property with the mortgagee's consent in writing, but without its being indorsed upon the mortgage or entered upon the record as required by statute, whether such consent be sufficient to protect the mortgagor from liability under the statute or not, the mortgagee is thereby estopped, as against a purchaser, from setting up any claim of title.³

623. New Jersey.⁴ — Every chattel mortgage shall vest in the mortgagee, or owner thereof, the right to the possession to the chattels therein described, so far as may be necessary for the purpose of preventing the removal thereof out of the county wherein they did lie at the time of the execution or delivery of such mortgage, and of recovering such chattels in case the same shall have been removed out of such county.

When such chattels shall be so removed by any party and recovered by the mortgagee or owner of the mortgage by means of legal proceedings, or when the removal thereof shall be prevented by like proceedings, the court in which such proceedings are had may regulate the disposition of such chattels, and prescribe such terms for the possession thereof by the mortgagee or other person interested therein as will protect the rights of such mortgagee or owner of such mortgage.

¹ *State v. Ladd*, 32 N. H. 110.

² *State v. Plaisted*, 43 N. H. 413.

³ *White Mountain Bank v. West*, 46 Me. 15.

⁴ R. S. 1877, p. 708, §§ 36-43; Supp. to Rev. 1886, p. 491.

These provisions do not apply to any vessel, rolling stock of railroads, or to any chattels which, in the ordinary use thereof at the time of the execution of the mortgage, are taken from time to time out of the county wherein they did lie when so mortgaged.¹

A mortgagee of personal property in possession of the same, who, without consent of the owner of the claim secured by mortgage, and with intent to defraud, removes any of the property mortgaged out of the county where it was situated at the time it was mortgaged, or secretes, destroys, sells, or exchanges the same without such consent, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or imprisonment at hard labor not exceeding six months, or both, at the discretion of the court.

623 *a*. New Mexico.²— Any person having conveyed to another any personal property by chattel mortgage, or other instrument of writing having the effect of a mortgage or lien upon such property, who during the existence of such mortgage or lien shall sell, transfer, conceal, take, drive, or carry away, or in any manner dispose of such property or any part thereof, or cause or suffer the same to be done, without the written consent of the holder of such mortgage or lien, shall be guilty of a misdemeanor, and on conviction may be fined in a sum not exceeding twice the value of the property so sold or disposed of, or confined in the county jail not exceeding six months, or both, at the discretion of the court.

624. New York.³— Any mortgagor of personal property who shall hereafter, with intent to defraud a mortgagee or purchaser of such property, sell, assign, exchange, secrete, or otherwise dispose of any personal property upon which he shall have given or executed a mortgage, or any instrument intended to operate as a mortgage, which at the time is a lien thereon, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be punished by a fine not exceeding three times the value of such property so sold, assigned, exchanged, secreted, or otherwise disposed of, or by imprisonment in the county jail of the county in

¹ Laws 1881, p. 227.

² Comp. Laws 1884, § 1598.

³ 3 R. S. 1875, p. 978, § 73; 3 R. S. 1882, 7th ed. p. 2527.

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which such offence is committed not exceeding one year, or by both such fine and imprisonment.

625. North Carolina.¹— If any person, after executing a chattel mortgage, deed in trust, or other lien for a lawful purpose, shall make any disposition of any personal property embraced in such mortgage, deed in trust, or lien, with intent to hinder, delay, or defeat the rights of any person to whom or for whose benefit such deed was made, every person so offending, and every person with a knowledge of the lien buying the property embraced in any such deed or lien, and every person assisting, aiding, or abetting the unlawful disposition of such property, with intent to hinder, delay, or defeat the rights of any person to whom or for whose benefit any such deed or lien was made, shall be guilty of a misdemeanor, and shall be punished by fine or imprisonment, or both, in the discretion of the court.²

626. Ohio.³— A mortgagor of personal property, in possession of the same, who, without the consent of the owner of the claim secured by mortgage, removes any of the property mortgaged out of the county where it was situated at the time it was mortgaged, or secretes or sells the same, or converts the same to his own use, with intent to defraud, shall be fined not more than five hundred dollars, or be imprisoned not more than three months, or both.

626 *a.* South Carolina.⁴— Any person who shall sell or dispose of any personal property on which any mortgage or other lien exists, without the written consent of the mortgagee or lienee, or the owner or holder of such mortgage or lien, and shall fail to pay the debt secured by the same within ten days after such sale or disposal, or shall fail in such time to deposit the amount of the

¹ Code 1833, § 1089. Justices of the peace have exclusive original jurisdiction of the offence of disposing of mortgaged property. *State v. Ham*, 83 N. C. 590.

² An indictment under this statute is fatally defective if it fails to set forth the manner in which the property was disposed of, and the name of the person who received it. The indictment must particularly identify the transaction on which it

is founded. See *State v. Pickens*, 79 N. C. 652; *State v. Burns*, 80 N. C. 376. The indictment is also defective if it fails to set forth that the lien was in force at the time of the sale. *State v. Burns*, *supra*.

³ Laws 1877, p. 251, § 18; 2 R. S. 1880, § 6849.

⁴ Acts 1881-82, No. 441; G. S. 1882, § 2515

said debt with the clerk of the court of common pleas for the county in which the mortgage or lien debtor resides, shall be guilty of a misdemeanor, and on conviction thereof shall be imprisoned for a term not more than two years, or be fined not more than five hundred dollars, or both, in the discretion of the court; but this provision shall not apply in cases of sales made without knowledge or notice of such mortgage or lien by the person so selling such property.

626 b. Tennessee.¹—The maker of any registered mortgage or deed of trust of personal property, or any person who shall dispose of the property conveyed in or covered by such conveyance, with the purpose of depriving the mortgagee, trustee, or any beneficiary of the same, or any part thereof, or of the proceeds, such person so disposing of such property shall be guilty of a felony, whether the party so offending had custody of the property at the time or not.

627. Texas.²—If any person has given or shall hereafter give any mortgage, deed of trust, or other lien, in writing, upon any personal or movable property or growing crop or farm produce, and shall remove the same or any part thereof out of the state, or shall sell or otherwise dispose of the same, with intent to defraud the person having such lien, either originally or by trans-

¹ Code 1884, § 5487.

² Paschal's Dig. § 2425; amended, Laws 1885, ch. 92.

In an indictment under this statute, it is essential to aver that the mortgage was valid, subsisting, and unpaid at the time the offence is alleged to have been committed. The fraudulent intent is the gist of the offence, and must be sufficiently averred and proved. *Satchell v. State*, 1 Tex. App. 438.

If the property was incorrectly described in the mortgage, the indictment should allege wherein such description was incorrect, and should then allege the true description, so that there may be no variance between the allegations and the proof. *Coleman v. State* (Tex.), 2 S. W. Rep. 859; *Honeycut v. State* (Tex.), 3 Ib. 716.

An indictment for selling a growing

crop, when the mortgage was executed on a crop not yet planted, should allege that the accused executed such a mortgage; that such crop was afterwards planted by the mortgagor; that when the same was growing or grown, the mortgage became a lien upon the same, and the accused fraudulently disposed of the same. *Mooney v. State* (Tex.), 7 S. W. Rep. 587; *State v. Devereux*, 41 Tex. 383.

The indictment should give the name of the person to whom the property was sold. *Presley v. State* (Tex.), 6 S. W. Rep. 540. The statute, before the amendment as to growing crops, applied only to personal or movable property. An ungathered crop still appendant to the ground was not regarded movable property, for a sale of which a mortgage could be prosecuted. *Hardeman v. State*, 16 Tex. App. 1.

fer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years.

627 a. Utah Territory.—Any mortgagor, agent, servant, or employee of any mortgagor of personal property who shall, during the time such mortgage remains in force, destroy, conceal, sell, or otherwise dispose of the whole or any part of the property mortgaged, or who shall remove the same or any part thereof from the territory, without the written consent of the mortgagee, his legal representative or assigns, shall be deemed guilty of obtaining money under false pretences, and on conviction thereof shall be punished by a fine not exceeding three times the value of the property described in the mortgage, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment, at the discretion of the court.¹

628. Vermont.²—No mortgagor of personal property shall sell or pledge any such property by him mortgaged without the consent of the mortgagee in writing upon the back of the mortgage, and on the margin of the record thereof, in the office where such mortgage is recorded. No mortgagor shall execute any second or subsequent mortgage of personal property while the same is subject to a previously existing mortgage or mortgages given by such mortgagor, unless the fact of the existence of such previous mortgage or mortgages is set forth in the subsequent mortgage. If any mortgagor shall be guilty of any offence against either of the two sections preceding, he shall be punished by fine equal to double the value of the property so wrongfully sold, pledged, or mortgaged, one half to the use of the party injured, and the other half to the use of the town where the mortgage is recorded.

629. Washington Territory.³—Any person having mortgaged personal property who shall remove the same from the county where it was situated at the date of the mortgage, before it is duly released, or without the consent in writing of the mortgagee, or who shall sell or dispose of the same, or any interest therein, where he parts with the possession thereof, or who shall secrete

¹ Laws 1884, ch. 21, § 11.

³ G. L. 1879, p. 106, § 14; Code 1881,

² Laws 1878, pp. 58, 59, §§ 8, 9, 10; R. § 1999.

L. 1880, §§ 1972-1974.

the same, shall be deemed guilty of a misdemeanor, and on conviction shall be punished by imprisonment in the county jail for a term not exceeding three years.

630. Wisconsin.¹ — Any person having conveyed any personal property by mortgage who shall, during the existence of the lien or title created by such mortgage, sell, transfer, conceal, remove, or carry or drive away said property, or any part thereof, or cause the same to be done, without the consent of the mortgagee or his assigns, and with the intent to defraud, shall be punished by imprisonment in the county jail not more than six months, or by fine not exceeding one hundred dollars.

631. Wyoming Territory.² — Any person who, after having conveyed any goods, chattels, or personal property, rights or privileges, to another by mortgage, or conveyance intended to operate as a mortgage, shall, during the existence of the lien created thereby, sell the said property, rights or privileges, or any part thereof, to any person or persons or corporation, without first procuring the consent of the mortgagee thereof to such sale, or shall remove said mortgaged property, or any part thereof, out of the jurisdiction of the district court of the county within which such property was at the time such mortgage was given, with intent to deprive the mortgagee of his security, without first obtaining the consent of the mortgagee thereof to such removal, shall be guilty of a felony; and on conviction thereof shall be imprisoned in the penitentiary for a term not exceeding ten years and not less than one year, and be fined in a sum not exceeding five hundred dollars.

¹ R. S. 1878, ch. 182, § 4467.

² Laws 1882, ch. 11, § 20; R. S. 1887, § 90.

CHAPTER XIV.

PAYMENT AND DISCHARGE.

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| I. Tender before and after default, 632-637. | V. Merger and subrogation, 658, 659. |
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I. Tender before and after Default.

632. At common law a tender made after forfeiture does not operate to revest the title in the mortgagor, so as to enable him to recover at law.¹ The mortgagee is not at law bound to receive the amount due and restore the property. If the mortgagor has any right, it is merely an equitable right of redemption.²

A tender of the debt after forfeiture does not revest the title in the mortgagor. Nothing short of acceptance of the tender will have that effect, and extinguish the legal title of the mortgagee in the property mortgaged.³

If the property be lost or destroyed after the refusal of a proper tender, the loss falls upon the mortgagee.⁴

The acceptance of a tender after forfeiture is a waiver of the forfeiture, and revests the title in the mortgagor.⁵

¹ *Mitchell v. Roberts*, 17 Fed. Rep. 776; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Charter v. Stevens*, 3 Den. (N. Y.) 33; *Stoddard v. Denison*, 3 How. (N. Y.) Pr. 296; *Rogers v. Traders' Ins. Co.* 6 Paige (N. Y.), 583, 587, 594; *Tompkins v. Batie*, 11 Neb. 147; *Jackson v. Cunningham*, 28 Mo. App. 354; *Frank v. Pickins*, 69 Ala. 369: the question left open in this case.

See 2 Jones on Mortgages, §§ 886-903.

² *Hulsen v. Walter*, 34 How. (N. Y.)

Pr. 385; *Wheeler v. Miller*, 2 Den. (N. Y.) 172; *Boone v. Rains*, 7 Mon. (Ky.) 384; *Sims v. Canfield*, 2 Ala. 555; *Jackson v. Cunningham*, *supra*.

³ *Blodgett v. Blodgett*, 48 Vt. 32; *Patchin v. Pierce*, *supra*; *Brown v. Bement*, 8 Johns. (N. Y.) 96; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Ackley v. Finch*, 7 Cow. (N. Y.) 290; *Heyland v. Badger*, 35 Cal. 404; *Brown v. Lipscomb*, 9 Port. (Ala.) 472.

⁴ *Goodman v. Pledger*, 14 Ala. 114.

⁵ *Patchin v. Pierce*, *supra*.

But the acceptance of a part of the money secured by the mortgage does not authorize such an inference.¹

633. Payment of the debt after forfeiture revests the legal title in the mortgagor, and he may assert this at law, although before payment he could avail himself of his equity of redemption only in chancery.² The mortgagee's acceptance of payment is considered as a waiver of the forfeiture, and as revesting in the mortgagor the legal title to the property, without a redelivery or resale and without a cancellation of the mortgage.³

And so if the mortgage be not given to secure the payment of money, but the delivery of certain property at a stipulated time, and the articles be not delivered at that time, but are afterwards delivered and accepted, the lien created by the mortgage is thereby discharged.⁴

634. A tender made after the mortgagee has taken possession for a breach of the condition will not enable the mortgagor to maintain replevin for the property.⁵ The legal title of the property vests in the mortgagee after condition broken, leaving nothing but an equitable right to redeem in the mortgagor. The mortgagee, until he has demanded possession, or taken some step to enforce the forfeiture, may, perhaps, be considered as waiving his strict legal right; but after such demand or proceeding to enforce his right, the mortgagor certainly has nothing but an equitable right to redeem. The effect of a tender after this cannot be to discharge the lien and reinvest the mortgagor with the legal title, unless such tender be kept good.

¹ Patchin v. Pierce, 12 Wend. (N. Y.) 61; Charter v. Stevens, 3 Den. (N. Y.) 33; Parks v. Hall, 2 Pick. (Mass.) 206, 210; Barry v. Bennett, 7 Met. (Mass.) 354, 360.

² West v. Crary, 47 N. Y. 423; Patchin v. Pierce, *supra*; Harrison v. Hicks, 1 Port. (Ala.) 423; Barry v. Bennett, *supra*; Parks v. Hall, *supra*; Moak v. Bourne, 13 Wis. 514; Thompson v. Van Vechten, 27 N. Y. 568; Jackson v. Cunningham, 28 Mo. App. 354; Wheless v. Rhodes, 70 Ala. 419; Burns v. Campbell, 71 Ala. 271; Askew v. Steiner, 76 Ala. 218.

³ Leighton v. Shapley, 8 N. H. 359; Sumner v. Batchelder, 30 Me. 35, 39; Flanders v. Barstow, 18 Me. 357; Greene v. Dingley, 24 Me. 131; West v. Crary, *supra*; Porter v. Parmley, 52 N. Y. 185, 188.

⁴ Butler v. Tufts, 13 Me. 302; and see Moak v. Bourne, *supra*.

⁵ Smith v. Phillips, 47 Wis. 202; Tompkins v. Batie, 11 Neb. 147. The tender in these cases was not kept good by payment of the money into court. See Mitchell v. Roberts, 17 Fed. Rep. 776, 779, per Caldwell, J.; Jackson v. Cunningham, *supra*.

A tender made to the mortgagee before the debt secured has fallen due, but made when the mortgagee is about to take possession under a stipulation authorizing him to do so, divests the title of the mortgagee as effectually as would a payment of the debt. The taking of possession by the mortgagee in such case confers upon the mortgagor the right to pay the debt and keep the property. If the mortgagee after such tender takes away and sells the property, he is guilty of a conversion, and the owner may maintain an action of trover.¹

635. But a tender made after forfeiture, and before the mortgagee has taken possession, or made a demand for possession, if the tender be kept good by payment of the money into court, is a good defence in an action by the mortgagee for possession. In such case the acquiescence of the mortgagee in the continued possession of the mortgagor after breach of the condition, without asserting his right under the forfeiture, is regarded as a waiver of the strict legal forfeiture according to the conditions of the mortgage; and therefore a tender made before the mortgagee has taken any step towards asserting his rights under the forfeiture is regarded as having the same effect in law as though made on the day the money became due. At all events, these facts afford a good equitable defence; and under codes allowing such a defence in an action at law, this defence is sufficient to defeat a recovery of possession by the mortgagee in an action at law.² But where equitable defences are not allowed in actions at law, such a defence could not be made.

636. A tender not kept good by payment of the money into court does not extinguish the lien.³ In New York and Michigan it is held, in cases relating to mortgages of real property, that it is not necessary to bring the money into court and keep

¹ *Rice v. Kahn* (Wis.), 35 N. W. Rep. 465.

² *Musgat v. Pumpelly*, 46 Wis. 660; and see *Archer v. Cole*, 22 How. (N. Y.) Pr. 411; and *Mitchell v. Roberts*, 17 Fed. Rep. 776.

³ § 634; *Roberts v. White* (Mass.), 15 N. E. Rep. 568; *Frank v. Pickens*, 69 Ala. 369.

A tender made by an agent of the owner is kept good by the agent's keeping the same money in his possession, subject to the order of the mortgagee, until the trial of the case, and then paying the same into court for the mortgagee's use. *Rice v. Kahn*, *supra*.

the tender good, in order to extinguish the lien of the mortgage, although such a tender does not operate in the way of payment of the debt.¹ In these and other states a mortgage of real property is not considered as vesting the legal title, but only a lien, in the mortgagee before foreclosure. But this rule in regard to the effect of a tender does not in New York apply in case of a mortgage of personal property, because in that state as well as in other states, except Michigan and Oregon, such a mortgage vests the legal title, and not merely a lien, in the mortgagee.²

637. In Michigan and Oregon a tender of the full amount due upon a chattel mortgage destroys the lien, so that the mortgagor may recover the property in an action of replevin; and the mortgagor is not obliged, in order to keep the tender good, to bring the money into court.³ The lien is discharged by the tender, and the mortgagee can thereafter rely only upon the personal responsibility of the debtor.⁴ The mortgagor is immediately entitled to the possession of the property, and, in trover for its value, the mortgagee is not entitled to the amount of his debt by way of recoupment or otherwise.⁵

If a tender made by a mortgagor of the amount due upon the mortgage be refused because it does not include the amount of an attorney's fee claimed to be due, but the mortgagee afterwards waives such fee and tenders a discharge, which the mortgagor accepts, with the remark that he would take his own time to pay in, he thereby waives his previous tender, and recognizes the mortgagee's right to demand and receive from him the amount due on the debt; and he makes himself liable for such debt upon the common counts in assumpsit.⁶

¹ 2 Jones on Mortgages, § 893; and see *Smith v. Phillips*, 47 Wis. 202; *Musgat v. Pumpelly*, 46 Wis. 660.

² *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Halstead v. Swartz*, 1 T. & C. (N. Y.) 559; *Noyes v. Wyckoff*, 30 Hun (N. Y.), 466.

³ *Flanders v. Chamberlain*, 24 Mich. 305; *Bartel v. Lope*, 6 Oregon, 321. See *Mitchell v. Roberts*, 17 Fed. Rep. 776, 779.

In these states a chattel mortgage does not vest any title in the mortgagee, but

simply gives him a lien upon the property. *Kohl v. Lynn*, 34 Mich. 360; *Baxter v. Spencer*, 33 Mich. 325; *Chapman v. State*, 5 Oregon, 432.

⁴ *Moynahan v. Moore*, 9 Mich. 9; *Caruthers v. Humphrey*, 12 Mich. 270; *Van Husan v. Kanouse*, 13 Mich. 303.

⁵ *Fuller v. Parrish*, 3 Mich. 211.

As to what is sufficient evidence of a tender, see *Daugherty v. Byles*, 41 Mich. 61.

⁶ *Fry v. Russell*, 35 Mich. 229.

II. *Appropriation of Payments.*¹

638. In the absence of a special appropriation of a payment by the mortgagor, the mortgagee may apply it to any debt due him from the mortgagor.² Although payments to a mortgagee be credited by him generally, he may, as against the mortgagor or his creditors, insist upon their appropriation to the reduction of unsecured accounts, if such an appropriation has been agreed upon between the parties. Thus a debtor having given a mortgage to secure a balance of account, continued to make further purchases of his creditor, and, being pressed by him for payment, told him that he would endeavor to pay him for the articles he had received after the mortgage was given, but that being secured for the other part of the account he must wait for the payment of that. The debtor afterwards made payments from time to time, which were credited to him severally on the creditor's books, and which exceeded the amount that was due when the mortgage was given, but were less than the amount of the articles afterwards furnished to him by the creditor. The latter having sold and appropriated the mortgaged property, he was summoned as trustee of the mortgagor. It was held, that the payments might be applied towards the payment of the subsequent accounts; and that he was not chargeable as trustee of the debtor.³

If it appears that it was the intention of the parties that the proceeds of the mortgaged property should be applied to the mortgage debt, this is equivalent to a direction as to the application of the fund.⁴

639. A court of equity will apply to the unsecured portion of the mortgagor's indebtedness payments not specifically applied by the parties or either of them. The debtor has, of course, the right to direct the application of any payment he may make; and, in the absence of any specific appropriation by him, the creditor may make such application as he may choose.⁵ But if no application has been made by either the debtor or the creditor, a court of equity will make the application to that portion of the

¹ See in general, on this subject, 2 Jones on Mortgages, §§ 904, 912.

² Richardson v. Coddington, 49 Mich. 1.

³ Capen v. Alden, 5 Met. (Mass.) 268.

⁴ Pritchard v. Comer, 71 Ga. 18.

⁵ Bird v. Davis, 14 N. J. Eq. 467; Richardson v. Coddington, 45 Mich. 338; S. C. 12 N. W. Rep. 886.

debt which remains unsecured, without regard to the order of time in which the indebtedness for the several items of account was incurred.¹ It has sometimes been contended, and sometimes adjudged, that the court should presume in favor of the debtor, that he intended to extinguish that debt which bears most heavily upon him; that he intended to extinguish the secured debt rather than the unsecured. But such an application is not equitable. "It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."²

Where a part of the notes secured by a mortgage are signed by a surety, and upon a foreclosure of the mortgage the proceeds are more than enough to meet the notes signed by the surety, but not enough to pay the notes in full, the mortgagee may apply the proceeds first to the payment of the notes not signed by the surety, and may then obtain judgment against the surety for the balance due upon the notes signed by him.³

640. Proceeds derived from the mortgage security must be applied in payment of the mortgage debt, in the absence of any agreement to the contrary with the mortgagor. The creditor has no option in such case to apply the proceeds to any other debt, as he has in case of a voluntary and general payment.⁴ Neither can the mortgagor direct the application of the proceeds to the payment of another debt due the mortgagee, as against the will of the mortgagee,⁵ or to the injury of subsequent incumbrancers.⁶

641. A creditor may apply at his option, to the payment of any instalment of the mortgage debt then due, the proceeds of personal property mortgaged as collateral security, and sold under a power to satisfy the debt, in the absence of any right reserved to the debtor to make the appropriation.⁷ Such

¹ *Schuelenburg v. Martin*, 1 McCrary, 348; *S. C. 2 Fed. Reporter*, 747, 10 Rep. 230; *Bell v. Radcliff*, 32 Ark. 645; *Vick v. Smith*, 83 N. C. 80; *Jenkins v. Beal*, 70 N. C. 440.

² *Field v. Holland*, 6 Cranch, 8, 28, per Marshall, C. J.

³ *Hanson v. Manley* (Iowa), 33 N. W. Rep. 357.

⁴ *Sanders v. Knox*, 57 Ala. 80; *Ogden v. Harrison*, 56 Miss. 743; and see *Isenberg v. Fansler* (Kans.), 13 Pac. Rep. 573; *Androscoggin Sav. Bank v. McKenney*, 78 Me. 442; *Nichols v. Knowles*, 3 McCrary, 477; 17 Fed. Rep. 494.

⁵ *Masten v. Cummings*, 24 Wis. 623.

⁶ *Hughes v. Johnson*, 38 Ark. 285.

⁷ *Saunders v. McCarthy*, 8 Allen

payment is not considered as one made by process of law or *in invitum*, like a payment made by levy of an execution, in which case, the several demands having been consolidated into one by the judgment, all the demands or instalments embraced in it must be taken to be satisfied proportionally.¹

If a mortgage be given to secure some portion, without specifying what portion, of an old debt, a part only of which is due, it will be presumed that the mortgage was given to secure that portion which was due, and the creditor has no option to apply the mortgage to that which was not due.²

As a general rule, two or more notes secured by a mortgage, falling due at different times, should be paid from the proceeds of the mortgaged property in the order of their maturity, in the absence of some agreement or paramount equity requiring a different order of payment.³ But where such notes fall due on the same day, and the mortgage fund is not sufficient to pay the entire amount, the notes should be paid *pro rata* out of the fund.⁴

III. *Changes in the Form of the Debt.*⁵

642. Although the evidence of the debt be changed from a simple contract like a promissory note to a judgment, the lien of a mortgage or pledge continues effectual until the debt is paid or discharged.⁶ If, after judgment has been rendered upon a note, the mortgagor brings a bill to redeem, alleging that the mortgage secured the same debt, it is necessary that he should identify the debt upon which the judgment was obtained as the debt for which the mortgage was given.⁷ A similar identification by the mortgagee is necessary in case he afterwards brings a bill to foreclose the mortgage.⁸

If, however, the circumstances be such that it must be inferred that the parties intended that the judgment should not be collateral to the note and mortgage, but that the original debt should

(Mass.), 42; *Allen v. Kimball*, 23 Pick. (Mass.) 473.

¹ *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129.

² *Calkins v. Clement*, 54 Vt. 635.

³ 2 *Jones on Mortgages*, § 1699.

⁴ *Aultman-Taylor Co. v. McGeorge*, 31 Kans. 329.

⁵ See generally, on this subject, 2 *Jones on Mortgages*, §§ 924-942.

⁶ *Fisher v. Fisher*, 98 Mass. 303; *Thurber v. Jewett*, 3 Mich. 295; *Butler v. Miller*, 1 N. Y. 496, 497; *Holmes v. Hinkle*, 63 Ind. 518; *Burton v. Tannehill*, 6 Blackf. (Ind.) 470. Much less does the commencement of a suit upon the mortgage note extinguish the lien of the mortgage. *Thurber v. Jewett*, *supra*.

⁷ *Hall v. Forqueran*, 2 Litt. (Ky.) 329.

⁸ *Holmes v. Hinkle*, *supra*.

be merged or extinguished by the judgment, such will be held to be the effect of the judgment.¹

643. The taking of a new note in exchange for the original note does not ordinarily discharge the mortgage.² It is, however, a question of the intention of the parties, and therefore is a question for the jury and not for the court.³

The acceptance by the mortgagee of the mortgagor's promissory note for the mortgage debt is not a waiver of the mortgage security.⁴

It has been held, that if one of several notes described in a mortgage be given up to the maker, and a new note for a different amount and payable at a different time be taken, without any agreement that it is to be secured by the mortgage, it will not be so secured as against the holders of other notes secured by the same mortgage.⁵

644. The taking of a second mortgage for the same debt upon the same or other property does not of itself extinguish the first, or operate as a cancellation of it, so as to let in an intervening mortgage to take precedence of the first, unless the second mortgage either expressly or by direct implication from its terms releases the first.⁶ The principle remains the same, although a small additional account be included in the renewal note and second mortgage. This may tend to show a motive for the transaction, but it has no tendency to show that the prior security was extinguished.⁷ It is erroneous to leave to the jury the question, whether the taking of such second mortgage merged or extinguished the first.⁸ "It may be conceded that if the acts of the parties had been attended by an express agreement to receive the second mortgage in satisfaction of the first one, the law would

¹ *Butler v. Miller*, 1 Den. (N. Y.) 407.

⁵ *Wilhelmi v. Leonard*, 13 Iowa, 330.

² *Watkins v. Hill*, 8 Pick. (Mass.) 522; *Pomroy v. Rice*, 16 Ib. 22; *Smith v. Prince*, 14 Conn. 472; *Hill v. Beebe*, 13 N. Y. 556; *Boyd v. Beck*, 29 Ala. 703; *Cullum v. Branch Bank*, 23 Ala. 797; *Packard v. Kingman*, 11 Iowa, 219; *Vick v. Smith*, 83 N. C. 80.

⁶ *Shuler v. Boutwell*, 18 Hun (N. Y.), 171; *Gregory v. Thomas*, 20 Wend. (N. Y.) 17; *Hill v. Beebe*, *supra*; *Packard v. Kingman*, *supra*; and see *Drury v. Briscoe*, 42 Md. 154; *Brown v. Dunckel*, 46 Mich. 29.

⁷ *Hill v. Beebe*, *supra*; *Boyd v. Beck*, *supra*.

³ *Cadwell v. Pray*, 41 Mich. 307.

⁴ *Westcott v. Gunn*, 4 Duer (N. Y.), 107.

⁸ *Hill v. Beebe*, *supra*.

give that effect to the transaction. But as the law does not give such a construction to the simple acts themselves, it was improper to leave it to the jury to infer an agreement and so find an extinguishment. The inference would be against the rule, and the rule itself would have to be surrendered."

A mortgagee taking a new mortgage on the same and other property for the same debt, extending the time of payment, impliedly covenants not to proceed upon the first.¹

645. A new mortgage and note are payment of the old securities when such is the agreement or understanding of the parties, and there is a presumption that they are taken in payment.² If after default the mortgagee take a new note payable at a later day than the first, and a new mortgage upon the same property, with the understanding between himself and the mortgagor that the new securities are a payment and satisfaction of the old, then the first mortgage is thereby extinguished and discharged, and any intermediate mortgage there may be upon the property takes precedence of the new mortgage.³

And so where a mortgage upon a stock of goods together with the note thereby secured were given up, because the mortgagor had become embarrassed, and had added to the stock new goods which the mortgage did not cover, and a new note secured by a new mortgage of the stock as it existed at that time was taken in place of the old, it was held that the first mortgage was extinguished by the second, and that upon the commencement of proceedings in insolvency against the mortgagor within six months afterwards the latter mortgage was void, because given by the mortgagor in contemplation of insolvency within that period; and the mortgagee could not fall back upon the first mortgage because that was extinguished.⁴

¹ Billingsley v. Harrell, 11 Ala. 775.

² Tracy v. Lincoln, 145 Mass. 357.

³ Daly v. Proetz, 20 Minn. 411. See, also, Harper v. Neff, 6 McLean, 390; Chapman v. Jenkins, 31 Barb. (N. Y.) 164; Butler v. Miller, 1 Den. (N. Y.) 407; Paul v. Hayford, 22 Me. 234; Brown v. Duncel, 46 Mich. 29.

⁴ Paine v. Waite, 11 Gray (Mass.), 190.

"It is not a case, therefore," said Mr. Justice Bigelow, delivering the opinion of

the court, "where a new and additional mortgage is given on a stock of goods, as cumulative security in connection with previous mortgages on the same property to the same person, which are still to continue in force. Such might have been the legal effect of giving a new mortgage if nothing had been said between the parties concerning the prior mortgages. But it is a case where an old security is abandoned and given up, and a new one taken as a

IV. *Payment of the Debt and its Effect.*

646. Payment of the debt secured by a mortgage operates as a satisfaction of the mortgage and extinguishes the title conveyed by the mortgage.¹ The lien cannot be retained after payment for the benefit of other parties, under a secret trust, to the prejudice of junior incumbrances.²

Payment of the debt, by whomsoever made, discharges the lien of the mortgage held as security for it, and the holder of such security has afterwards no authority to transfer the security.³ Payment is also a defence to a subsequent action brought by the mortgagee to recover the property.⁴

A bill of sale absolute in form but given as security is rendered null and void by payment of the debt secured equally as if the bill of sale had contained such a condition.⁵

After a voluntary payment of a mortgage debt made in full by the mortgagor, though under protest and a claim of overpayment, he cannot recover the amount he claims to have overpaid. Though he makes the payment to protect his property from sale under a power in the mortgage, the payment is not made under duress unless there is some circumstance or threat of the use of violence or force to take the property.⁶

647. Payment of the principal debt discharges a mortgage given to a surety of that debt. Thus a mortgage conditioned to save the mortgagee harmless against liability, as indorser or surety on a note given by the mortgagor to a third person, is extinguished when the mortgagor procures the cancellation of the

substitute for that which previously existed. Nor does this case resemble those in which it has been held that a mortgage remains valid and in force after the note or obligation secured by it has been given up and a new one taken in its place. In such cases, only the evidence of the debt is changed; the debt still remains, and the security is not altered. But in the case at bar the evidence of the debt and the security were both changed under an agreement that the new should take the place of the old."

¹ *Shiver v. Johnston*, 62 Ala. 37; *Dryer v. Lewis*, 57 Ala. 551; *Bellamy v. Doud*, 11 Iowa, 285; *Butler v. Tufts*, 13 Me. 302.

² *Hunt v. Daniels*, 15 Iowa, 146.

³ *Bowditch v. Green*, 3 Met. (Mass.) 360; *Harrison v. Hicks*, 1 Port. (Ala.) 423; *Kemerer v. Bloom*, 65 Iowa, 363; *Long v. Moore*, 56 Mich. 23. As to what constitutes sufficient evidence of payment, see *Chapman v. Hunt*, 18 N. J. Eq. 414.

⁴ *Slaughter v. Swift*, 67 Ala. 494. The same rule generally applies in respect to mortgages of real property. But in Alabama the rule is otherwise. *Slaughter v. Swift*, *supra*.

⁵ *Wallard v. Worthman*, 84 Ill. 446.

⁶ *Vick v. Shinn* (Ark.), 4 S. W. Rep. 60.

note, and the substitution of a new note in its stead with a different surety; and the mortgagee cannot afterwards, or even contemporaneously, make a valid assignment of the mortgage to the new surety. But the mortgage may be kept alive as between the parties by means of a verbal agreement between the mortgagor, the mortgagee, and the surety on the new note, made contemporaneously with the cancellation and substitution of the notes, to the effect that the mortgage shall stand as security for the new note.¹

If the mortgage secure the mortgagee from a contingent liability as indorser or surety upon negotiable paper, the lien is discharged by the payment of such paper by the principal debtor,² but if the mortgagee pays the debt he may enforce the mortgage to indemnify himself.³

A release of a surety by the creditor discharges a mortgage given to the surety by the debtor. Thus, where a debtor gave his surety a mortgage to secure him against his liability upon a note, and the surety assigned the mortgage to the creditor for his indemnity, taking from the latter a discharge under seal, it was held that the mortgage was paid, and therefore was no longer in force. The design of the mortgage was merely to protect the surety against his liability upon the note, and that protection having been given by the debtor's discharge, the condition of the mortgage was fulfilled.⁴

648. But there is no discharge if the surety himself advances the money to pay the debt for which he is bound. Thus an indorser for accommodation does not discharge a mortgage taken for his security by advancing the money to pay the note at maturity, unless the parties intended that the mortgage should be thereby discharged.⁵ Neither does the payment of such note out of the proceeds of a new note made by the mortgagor and indorsed by the mortgagee for that express purpose discharge the mortgage, but this continues in force as a security to the

¹ *Brooks v. Ruff*, 37 Ala. 371.

² *Franklin Bank v. Pratt*, 31 Me. 501; *Hill v. Beebe*, 13 N. Y. 556; *Packard v. Kingman*, 11 Iowa, 219.

³ *Knight v. Rountree* (N. C.), 6 S. E. Rep. 762.

⁴ *Sumner v. Bachelder*, 30 Me. 35. See *Rainbow v. Juggins*, 5 Q. B. D. 138.

⁵ *Bryant v. Pollard*, 10 Allen (Mass.), 81; *Davis v. Maynard*, 9 Mass. 242; *Packard v. Kingman*, *supra*. See *Draper v. Saxton*, 118 Mass. 427.

mortgagee for his liability upon the second note. There is in such case no payment of the original debt, but a substitution of a new note for the old, the mortgagee remaining under the same liability. It is proper in such case to show by parol evidence that the payment of the original note with the proceeds of the second was not designed to extinguish the mortgage.¹

But if a subsequent mortgagee purchase the equity of redemption at an execution sale and pay off the prior mortgage, his own mortgage is extinguished, for he cannot subject the property in his own hands to its payment. He cannot foreclose against himself, or sell the property to pay himself. He is paid by operation of law.²

If a purchaser of chattels at an execution sale pay off an existing mortgage, it is thereby extinguished, and he cannot enforce it against any other property embraced in it. If he does not pay it off, but takes it by purchase and assignment, it is an operative and valid lien in his hands.³

649. A mortgage is extinguished by a payment made with the mortgagor's money, by one who purchased the chattel at a sheriff's sale to aid the debtor in defrauding his creditors. It is in effect the case of a debtor whose property is subject to successive liens paying out of his own means the debt for which the earliest lien was created, and attempting to keep the security outstanding in the name of a third person, in order to resume it at his pleasure or convenience, upon a new transaction. Payment of the mortgage debt by the party indebted releases the mortgage. There can be no subrogation of the purchaser of the equity of redemption to the mortgage security through such a payment. Neither is there any merger of the mortgage in the equity of redemption upon an assignment of it to such purchaser, for there is in such case no union in him of the property in the chattel and the charge upon it, because the charge was extinguished by payment before it was in form assigned to the purchaser. The mortgage was in fact paid by the actual debtor whose duty it was to pay it.⁴

¹ *Pond v. Clarke*, 14 Conn. 334; *Smith v. Prince*, 14 Conn. 472; *Chapman v. Jenkins*, 31 Barb. (N. Y.) 164.

² *Merritt v. Niles*, 25 Ill. 282.

³ *Brown v. Rich.* 40 Barb. (N. Y.) 28.

⁴ *Thompson v. Van Vechten*, 27 N. Y. 568.

If a mortgagor furnish money to another with which to purchase the mortgage, and an assignment of the mortgage is accordingly taken to such other person, it is, as against the mortgagor, *pro tanto* discharged; and if such assignee seek a foreclosure, the mortgagor is entitled to a credit for the money thus advanced by him.¹

A mortgage does not cease to be a lien, and the debt it secures is not to be considered paid, merely because the mortgagor has an offset against his creditor exceeding the debt.²

650. A conversion of the mortgaged property by the mortgagee to his own use is a payment of the mortgage debt *pro tanto*.³

651. Neither default nor foreclosure constitutes payment. The absolute title which vests in the mortgagee upon the mortgagor's default does not operate as payment of the debt secured. This vesting of the title in the mortgagee is for certain purposes only, the chief of which is the giving the mortgagee control of the property, so as to enable him with more ease and facility to collect the debt secured by applying the property for that purpose. This title amounts to payment only when it is perfected by foreclosure; and even then it is only payment *pro tanto*. If, without the mortgagee's fault, the property is lost or destroyed before his proceedings to apply the property to the payment of the debt are consummated, the loss does not fall upon him but upon the mortgagor. Thus, a mortgage having been made of slaves, the emancipation of the slaves by act of the government of the United States occurred after default and before the mortgagee had by foreclosure applied them to the payment of the debt, and it was held that the loss fell upon the mortgagor, and the mortgagee, while losing his security, is not obliged to give credit on the mortgage debt for the value of the property thus destroyed.⁴

But the mortgagee's absolute title will operate as payment, if he take it after default with the full understanding of the parties

¹ McLemore v. Pinkston, 31 Ala. 266.

Grant, 9 Mich. 42. See Clark v. Griffith,

² Warner v. Comstock, 55 Mich. 615;

2 Bosw. (N. Y.) 558.

McRae v. Davenport, 51 Mich. 633.

⁴ Tucker v. Toomer, 36 Ga. 138. See

³ Davis v. Rider, 5 Mich. 423; Place v.

Moody v. Huselden, 1 S. C. 129.

that he should take it in full discharge of the mortgage debt. In such case his title is perfect, and the debt is cancelled. The mortgagor can regain the property only by a repurchase.¹

652. Presumptions of payment. — Possession of the mortgaged property after the maturity of the mortgage is not presumptive evidence of satisfaction of the mortgage debt, without proof that the property had once been delivered to the mortgagee; in which case the redelivery of the property by the mortgagee would raise a strong presumption that the debt had been satisfied.²

Possession of the mortgage and mortgage note by the mortgagor is *prima facie* evidence of its payment and discharge, though no entry of satisfaction be made upon the record. One purchasing from the mortgagor may rely upon this presumption. Though the mortgagee has surrendered the mortgage and note upon receiving other property, the title to which proves to be bad, he must bear the consequences, and cannot claim the mortgaged property from the purchaser on the ground that the mortgage has not been paid.³

653. A discharge of the debtor under proceedings in bankruptcy or insolvency does not deprive the creditor of his right to enforce his mortgage security, although it relieve the debtor from personal liability.⁴

Neither is the mortgage lien discharged by the debt's becoming barred by the statute of limitations.⁵

654. Proof of a debt against the estate of a deceased mortgagor and receipt of a dividend from the assets do not extinguish a mortgage given to secure a part of such debt. But in such case the payments should be applied *pro rata* upon the secured and unsecured parts of the debt.⁶

Neither does the taking of administration by a mortgagor upon

¹ Greene v. Dingley, 24 Me. 131.

² Carpenter v. Bridges, 32 Miss. 265.

³ Wilkinson v. Solomon (Ala.), 3 So. Rep. 705.

⁴ Hamilton v. Bredeman, 12 Rich. (S. C.) 464; Stewart v. Anderson, 10 Ala.

504; Roden v. Jaco, 17 Ala. 344; Chamberlain v. Meeder, 16 N. H. 381.

⁵ Crain v. Paine, 4 Cush. (Mass.) 483. See Almy v. Wilbur, 2 Woodb. & M. 371.

⁶ Schuelenburg v. Martin, 1 McCrary, 348; S. C. 2 Fed. Reporter, 747.

the estate of his mortgagee necessarily operate as payment of the mortgage debt.¹

655. A bequest of money by the mortgagee to the mortgagor does not extinguish the mortgage debt *pro tanto*, unless there is something in the terms of the bequest to show that such was the purpose of the bequest.²

656. An agreement by a mortgagee to release a part of the property upon the payment of a sum specified operates to release the mortgage lien upon that part of the property upon the payment of that sum; but the payment of any part of that sum has no effect in releasing any of the mortgaged chattels.³

657. A recital of payment in a recorded release of a mortgage is not necessarily conclusive of the fact as against the mortgagee. Thus, after a large part of a mortgage debt had been paid, the mortgagor, who was a merchant, requested the mortgagee to discharge the mortgage upon his stock because it affected his credit with the mercantile agency. Several months afterwards he purchased other merchandise in Paris, and added it to his stock; and afterwards, being in failing health, at the request of the former mortgage creditor he executed a new mortgage of all his stock of merchandise to secure the payment of the balance of the debt due at the time of the release of the former mortgage. There was no evidence of fraud or corrupt dealing in this transaction. The seller of the goods which the merchant bought in Paris claimed that the mortgage was invalid so far as it affected the merchandise bought of him; but it was held that there was no ground of objection to the validity of the mortgage, either on account of the recital in the release of the former mortgage or on the ground of fraud.⁴

¹ Miller v. Donaldson, 17 Ohio, 264.
See 2 Jones on Mortgages, § 919.

² Harrington v. Brittan, 23 Wis. 541.

³ Clark v. Griffith, 2 Bosw. (N. Y.) 558.

⁴ Homer v. Grosholz, 38 Md. 520.

V. *Merger and Subrogation.*¹

658. A surety who has been compelled to pay the debt of the principal is entitled for his indemnity to a mortgage given by the principal debtor to the creditor.² This is a familiar and well established rule of equity. The surety is entitled to every remedy which the creditor has against the principal debtor, and is entitled to stand in his place.³ But to entitle a surety to be substituted in place of the creditor, he must pay the whole of the debt he is bound to pay. If he pays only a part, the creditor still has a right to retain the pledge for his own security and benefit.⁴ Where there are several notes secured by a mortgage, a surety upon one of the notes cannot be subrogated to the mortgage security unless he pays the entire indebtedness secured by the mortgage.⁵

In New York the surety is entitled in such case to receive an assignment of a mortgage held by the creditor. He has then the same right to enforce the mortgage that the mortgagee had; and he has the same right of action against one who has wrongfully converted the mortgaged property.⁶

But a surety does not, by paying the debt of his principal, become entitled to the benefit of collateral security for the payment of the debt given by his co-security.⁷

659. If a mortgagee for the protection of his interests pays or purchases a prior lien upon the property, he thereby acquires an equitable lien for the money thus expended, as against the mortgagor and subsequent lien-holders, although such prior lien

¹ The general principles governing merger and subrogation are the same, whether the subject matter of the mortgage be real property or personal property; and inasmuch as these have been stated somewhat fully by the author in his treatise upon Mortgages of Real Property, vol. 1, §§ 848-885, they are not repeated here. In the following sections are given only those cases which relate to chattel mortgages, and which, therefore, are not included in the former treatise.

² *Richardson v. Washington Bank*, 3

Met. (Mass.) 536; *Osborne v. Smith*, 5 McCrary, 487.

³ *Hayes v. Ward*, 4 Johns. (N. Y.) Ch. 123, 130; *Torp v. Gulseth* (Minn.), 33 N. W. Rep. 550.

⁴ *Ex parte Rushforth*, 10 Ves. Jr. 409, 420, per Lord Eldon.

⁵ *Rice v. Morris*, 82 Ind. 204; *Zook v. Clemmer*, 44 Ind. 15.

⁶ *Lewis v. Palmer*, 28 N. Y. 271.

⁷ *Bowditch v. Green*, 3 Met. (Mass.) 360. See *Jones on Pledges*.

be an attachment which," by the enforcement of the mortgage, is extinguished.¹

If a purchaser of personal property be obliged for his own protection to pay off an existing mortgage, he is entitled to set off the amount so paid against the vendor's claim for purchase money; and the fact that such mortgage had been filed or recorded before the purchase does not prevent the set-off, the sale not having been made expressly subject to the mortgage.²

A third person paying the mortgage debt is not subrogated to the mortgagee's interest in the property unless he has an interest in it which entitles him to redeem; and although he take possession of the property upon paying the mortgage, it is liable to attachment and execution in his hands upon the suit of a creditor of the mortgagor.³ But if a third person has such an interest in the property, and he is under no obligation to pay the debt, payment by him does not operate as a satisfaction of the debt, unless it is manifestly the intention or interest of the person making the payment that it should so operate;⁴ but such payment subrogates him to the benefit of the security.

Where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor, or in the place of the creditor, the person making such payment will be subrogated to the creditor's rights as mortgagee.⁵

VI. *Release or Discharge otherwise than by Payment.*

§ 660. A mortgage of personal property may be released by a sufficient parol contract on the part of the mortgagee, although the mortgage itself be under seal, and the debt be unpaid.⁶

661. A sale of the mortgaged property by the mortgagor with the mortgagee's consent discharges the mortgage lien thereon.⁷ But where the parties to a mortgage indorsed thereon

¹ *Armstrong v. McAlpin*, 18 Ohio St. 184; *Walker v. Stone*, 20 Md. 195.

² *Lane v. Romer*, 2 Chand. (Wis.) 61.

³ *Woods v. Gilson*, 17 Ill. 218.

⁴ *Walker v. Stone*, *supra*.

⁵ *Crippen v. Chappel*, 35 Kans. 495; 11 Pac. Rep. 453; *Yaple v. Stephens*, 36 Kans. 680; 14 Pac. Rep. 222.

⁶ *Wallis v. Long*, 16 Ala. 738; *Acker v. Bender*, 33 Ala. 230. See *Stevenson v. Adams*, 50 Mo. 475; *Howard v. Gresham*, 27 Ga. 347.

⁷ *Conkling v. Shelley*, 28 N. Y. 360; *Brandt v. Daniels*, 45 Ill. 453; *Rickerson v. Raeder*, 4 Abb. App. Dec. (N. Y.) 60; *S. C. 1 Keyes*, 492; *Field v. Doyon*, 64

an agreement that, if the mortgagor should sell any of the property, the mortgagee should discharge all claim on the same upon the receipt of the money therefor, it was held that this agreement was conditional, and gave no authority to the mortgagor to divest the mortgagee's interest in the property by a sale, except upon a performance of the condition of paying the purchase money to him. The purchaser in such case, if he knew of the agreement, knew all its qualifications and conditions precedent, and was properly bound by them. If he had no such knowledge, and the mortgage was duly recorded, he bought the property subject to the mortgage, and was bound to know that the mortgagor had no right to sell.¹

And so where a mortgagee executed a release and sent it to an agent to be delivered on payment of the amount due on the mortgage, and a subsequent purchaser procured the same upon his promise to pay in a few weeks the sum due, and he neglected to do this, it was held, on a bill to foreclose the mortgage, that the release was inoperative, and could not take effect until the mortgage debt had been paid.² If a release be executed to take effect upon the performance of a condition precedent, and the release be by mistake placed upon record without the consent of the mortgagee, the mortgage is not discharged even as against the creditors of the mortgagor.³

A mortgagee having made an agreement with the mortgagor to discharge the mortgage for the benefit of a purchaser, subsequently signed and sent to the mortgagor a written instrument agreeing to discharge the mortgage, and to hold the purchaser harmless in relation to it. The mortgagor delivered this agreement to the purchaser, by whom it was carried to the town clerk, in whose office the mortgage was recorded, who thereupon made an entry, signed and attested by him, on the margin of the record of the mortgage, in the following terms: "This mortgage having been duly cancelled by the mortgagor, and an order for discharge given by the mortgagee, therefore this record is made." It was held that the facts authorized the jury to find that there had been a *bonâ fide* discharge of the mortgage, not only as against the

Wis. 560. See § 465; *Bangs v. Friezen* (Minn.), 32 N. W. Rep. 173.

² *Hale v. Morgan*, 68 Ill. 244.

³ *Stanley v. Valentine*, 79 Ill. 544.

¹ *Whitney v. Heywood*, 6 Cush. (Mass.) 82.

purchaser who had acted upon the faith of discharge, but as against any others who derived title from him.¹

662. If a mortgagee authorize the mortgagor to withdraw the mortgage from the files and destroy it, this amounts to a discharge of the lien, especially as against one who afterwards in good faith purchases the property.²

662 *a.* A release of record, made by a mortgagee after he has assigned a negotiable note not due secured by the mortgage, will not discharge it, as against an assignee of such note which remains unpaid.³

VII. *Statutory Provisions for entering Satisfaction of Record.*

663. In general. — In many states it is provided that mortgages of personal property, which have been recorded or filed as provided by statute, shall upon payment be discharged or satisfied by a release or entry upon record, and penalties are imposed upon mortgagees who neglect or refuse to make such discharge. Such a provision for the discharge of mortgages of real estate is to be found upon the statute books of almost every state and territory; but in only a part of the states is there such an enactment in relation to chattel mortgages. This difference in legislative enactments in regard to the discharge of real estate mortgages and those relating to the discharge of mortgages of personal property arises from the fundamental distinction between real and personal property. The title to real property can be transferred only by deed; and the policy of the recording acts requires that every deed of such property shall appear of record, so that a purchaser who takes a conveyance in good faith shall be protected in the title that appears of record. But no deed in writing is necessary for the transfer of title to personal property. A purchaser takes the title of his vendor, and must rely upon his possession or upon his warranty. “A mortgage duly recorded,” said Mr. Justice Hoar, of Massachusetts,⁴ “gives certain rights to the mortgagee, created and defined by the statute, but the statute

¹ Stowell v. Goodale, 6 Cush. (Mass.) 452.

² Gruner v. Star Printing Co. 40 Wis. 523.

³ Martindale v. Burch, 57 Iowa, 291; Jones on Mortgages, § 814.

⁴ Bigelow v. Smith, 2 Allen (Mass.), 264.

does not change the nature of the property, nor require that all subsequent changes in title shall be shown upon the record. An assignment or release of the mortgage is not required to be recorded."

The states, therefore, which require the recording of a release or satisfaction of a chattel mortgage do not make the requirement because the same necessity exists as in the case of mortgages of real property, but because there is a certain convenience in having the record made clear upon payment of the debt.

In the following sections only those statutes requiring the recording of discharges are quoted which relate in direct terms, or by necessary implication, to chattel mortgages. In a few of the states the same statute applies to the recording of discharges of both mortgages of real estate and mortgages of personal property.¹ But generally these statutes are different; and in those states in which filing of chattel mortgages is substituted for recording them, the statutes are necessarily different in terms.

664. Alabama.²—A mortgagee, or the assignee or transferee of a debt secured by mortgage, who has received partial payment, if the mortgage is of record, must, on the request in writing of the mortgagor, or of a judgment creditor or other creditor of the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, enter on the margin of the record of the mortgage the date and amount of such partial payment or payments. If, for thirty days after such request, the mortgagee, or the transferee or assignee, fails to make such entry, he forfeits to the party making such request two hundred dollars.

If a mortgage which is of record has been fully paid or satisfied, the mortgagee, or the transferee or assignee of the mortgagee, who has received payment or satisfaction, must, on the request in writing of the mortgagor or of a judgment or other creditor of

¹ It is possible that, in a few states, statutes which relate in general terms to the recording of releases of mortgages may by construction apply to chattel mortgages as well as mortgages of real property. It is apparent, for instance, that the statute of California upon this subject applies to both kinds of mortgages; and therefore that statute is quoted. It may

be that some statute which really applies to both kinds of mortgages has been omitted, because it could not be made out whether it did so apply. For such doubtful statutes see those of *Arizona*, Compiled Laws 1877, §§ 2281-2284; *Colorado*, Gen. Laws 1877, §§ 1847-1849; and *Florida*, Laws 1877, p. 56, ch. 3013.

² Code 1886, §§ 1868-1870.

the mortgagor having a lien or claim on the property mortgaged, or of a purchaser from the mortgagor, enter the fact of payment or satisfaction on the margin of the record of the mortgage. Such entry operates a release of the mortgage, and is a bar to all suits thereon at law or in equity. If, for three months after such request, the mortgagee, or assignee or transferee, fails to make such entry, he forfeits to the party making the request two hundred dollars, unless there is pending or there is instituted a suit within that time in which the fact of payment or satisfaction is or may be contested.

The payment of a mortgage debt, whether the mortgage is of real or personal property, divests the title passing by the mortgage.

664 a. Arizona Territory.¹ — Any mortgage may be discharged by an entry on the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage, in the presence of the recorder or his deputy, who shall subscribe the same as witness, and such entry shall have the same effect as a deed of release duly acknowledged and recorded.

Any mortgage shall also be discharged upon the record thereof by the recorder in whose custody it shall be, whenever there shall be presented to him a certificate of the property, acknowledged or proved and certified, specifying that such mortgage has been paid, or otherwise satisfied and discharged.

Every such certificate shall be recorded at full length, and a reference shall be made to the discharge of such mortgage upon the record thereof.

If any mortgagee, or his personal representative or assignee, as the case may be, after a full performance of the conditions of the mortgage, whether before or after a breach thereof, shall, for the space of seven days after being thereto requested, and after tender of his reasonable charges, refuse or neglect to execute and acknowledge a certificate of discharge or release thereof, he shall be liable to the mortgagor, his heirs or assigns, in the sum of one hundred dollars, and also for all actual damages occasioned by such neglect or refusal.

¹ R. S. 1887, §§ 2360-2363.

STATUTORY PROVISIONS FOR ENTERING SATISFACTION. [§§ 665-667.

665. Arkansas.¹— When any mortgage, or trust deed of personal property, shall have been fully paid off or satisfied, it is the duty of the mortgagee or beneficiary, his assignee or personal representative, to enter satisfaction, or cause satisfaction thereof to be entered of record, under the head of "Remarks." If any person thus receiving satisfaction do not, within sixty days after being requested, acknowledge satisfaction, he shall forfeit to the party aggrieved any sum not exceeding the amount of the mortgage money, to be recovered by civil action in any court of competent jurisdiction.

666. California.²— A recorded mortgage may be discharged by an entry in the margin of the record, signed by the mortgagee, or his personal representative or assignee, acknowledging satisfaction in the presence of the recorder, who must certify the acknowledgment substantially as follows: "Signed and acknowledged before me, this day of , in the year . A. B., Recorder." If not discharged in this manner, it must be discharged upon the record by the officer, on presentation of a certificate signed by the mortgagee, his representative or assign, acknowledged or proved, stating that the mortgage has been paid or discharged. The certificate is recorded at length with reference to and upon the record of the mortgage. The mortgagee must immediately upon request enter satisfaction or make a discharge of the mortgage in such form as to entitle it to be recorded, and upon his neglect or refusal to do so is liable for all damages which the mortgagor or his grantee may sustain by reason of such refusal, and also forfeits to him the sum of one hundred dollars, to be recovered in a civil action.

667. Dakota Territory.³— Every mortgage of personal property may be cancelled by the register of deeds upon the presentation to him of a receipt for the sum, money, or property secured, or an acknowledgment of satisfaction thereof signed by the mortgagee.

¹ Dig. of Stats. 1884, §§ 4746, 4747, 4755.

A mortgagee who has transferred his mortgage before receiving a request to enter satisfaction is not liable to the pen-

alty of the statute. *Harris v. Swanson*, 67 Ala. 486.

² Civil Code, §§ 2938-2941; Codes and Stats. 1876, §§ 7938-7941.

³ R. C. 1883; § 1750 of Civil Code.

667 *a. Georgia.* — Any mortgagor who may have paid off his mortgage may present the same, together with the order of the mortgagee or transferee directing that the mortgage be cancelled and the order recorded across the face of the record, to the clerk of the superior court of the county or counties in which the same is recorded, when such clerk is hereby required to write across the face of such record the word "Satisfied," and the date of such entry, and sign his name thereto officially.¹

667 *b. Idaho Territory.* — A recorded mortgage may be discharged by an entry in the margin of the record thereof, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the recorder, who must certify the acknowledgment in form substantially as follows:—

"Signed and acknowledged before me, this day of ,
in the year of . A. B., Recorder."

A recorded mortgage, if not discharged as provided in the preceding section, must be discharged upon the record by the officer having custody thereof, on the presentation to him of a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged or proved and certified as prescribed by the chapter on "Recording Transfers," stating that the mortgage has been paid, satisfied, or discharged.

A certificate of the discharge of a mortgage, and the proof or acknowledgment thereof, must be recorded at length, and a reference made in the record to the book and page where the mortgage is recorded, and, in the minute of the discharge made upon the record of the mortgage, to the book and page where the discharge is recorded.

Any mortgagee, or assignee of such mortgagee, who refuses to execute, acknowledge, and deliver to the mortgagor the certificate of discharge, or to enter satisfaction, or cause satisfaction of the mortgage to be entered, as provided in this chapter, is liable to the mortgagor, or his grantee or heirs, for all damages which he or they may sustain by reason of such refusal, and shall also forfeit to him or them the sum of one hundred dollars.²

¹ Laws 1885, p. 129.

² R. S. 1887, §§ 3361-3364.

668. Illinois.¹ — Every mortgagee of real or personal property, his assignee of record, or other legal representative, having received full satisfaction and payment of all such sum or sums of money as are really due to him from the mortgagor, shall, at the request of the mortgagor, his heirs, legal representatives or assigns, enter satisfaction upon the margin of the record of such mortgage, in the recorder's office, which shall forever thereafter discharge and release the same, and shall bar all actions or suits brought or to be brought thereupon. All releases of mortgages and deeds of trust which have heretofore been made in accordance with these provisions shall be held legal and valid, and have the same force and effect as if made under the provisions of this act. A mortgage or trust deed of real or personal property may be released by an instrument in writing executed by the mortgagee, trustee, or his executor, administrator, heirs or assigns of record, and such instrument may be acknowledged or proved in the same manner as deeds for the conveyance of land.

If any mortgagee or trustee, in a deed in the nature of a mortgage of real or personal property, or his executor or administrator, heirs or assigns, knowing the same to be paid, shall not, within one month after the payment of the debt secured by such mortgage or trust deed, and request and tender of his reasonable charges, release the same, he shall, for every such offence, forfeit and pay to the party aggrieved the sum of fifty dollars, to be recovered in an action of debt before a justice of the peace.

669. Kansas.² — When any mortgage of personal property shall have been fully paid or satisfied, it shall be the duty of the mortgagee, his assignee, or personal representatives, to enter satisfaction or cause satisfaction thereof to be entered of record, in the same manner, as near as may be, and under the same penalty for neglect or refusal, as provided in case of the satisfaction of mortgages of real estate. The entry of satisfaction shall be made in the book in which the mortgage is entered, as hereinbefore provided; and any instrument acknowledging satisfaction shall not be recorded at length, but shall be referred to under the head of

¹ R. S. 1874, R. S. 1880, and Annot. Stats. 1885, ch. 95, §§ 8-10.

² Dassel's Compiled Laws 1885, § 3506. As to enforcement of the penalty, see *Thomas v. Reynolds*, 29 Kans. 304.

“Remarks,” and filed with the mortgage or copy thereof, and preserved therewith in the office of the register.

670. Kentucky.¹— Liens by deed or mortgage may be discharged by an entry acknowledging satisfaction of the same on the margin of the record thereof, signed by the person entitled to the same, or his personal representative, and attested by the clerk or his deputy, which, in the case of a mortgage or deed of trust, shall have the effect to reinvest the title in the mortgagor or grantor, or person entitled thereto.

671. Maryland.²— A mortgage of personal property may be released in the same manner as a mortgage of real property. Such release may be made in the following form, or to like effect: “I hereby release the above (or within) mortgage. Witness my hand and seal this day of . (Seal.)” This may be written by the mortgagee or his assignee upon the record, in the office where the mortgage is recorded, and attested by the clerk of the court; or it may be indorsed on the original mortgage by the mortgagee or his assignee; and upon such mortgage, with the release, being filed in the office in which the mortgage is recorded, the clerk is required to record the release at the foot of the mortgage. When the mortgage, with the release, is filed for this purpose, the clerk retains it in his office, and does not permit it to be again withdrawn. A release may be made by an executor or assignee in the same manner and with like effect as by the mortgagee.

671 *a.* Michigan.³— Any chattel mortgage, or any instrument intended to operate as a chattel mortgage, that has been or may hereafter be filed, may be discharged by an entry on the book kept by the township or city clerk, as provided in section four thousand seven hundred and eight of the Compiled Laws of eighteen hundred and seventy-one, where the time of filing such instrument has been entered, signed by the mortgagee, or his personal representative or assignee, acknowledging the satisfaction of the mortgage in the presence of the township or city clerk, or city recorder, as the case may be, or his deputy, who shall sub-

¹ G. S. 1873, and 1881, p. 256, ch. 24, § 12.

² Code 1860, art. 24, §§ 33-38, 50; R. Code 1878, art. 44, §§ 39-44, 53.

³ Public Acts 1881, No. 117.

scribe the same as a witness thereto; and such entry shall have the same effect as a deed or instrument of release, duly acknowledged and filed; and thereupon said chattel mortgage, or the copy thereof which may have been filed, shall, at the request of the mortgagor, be delivered to him by such clerk, recorder, or his deputy, and such clerk or recorder shall make an entry of the date of such delivery, and to whom delivered.

If any mortgagee, or his personal representative or assignee, as the case may be, after full performance of the conditions of a chattel mortgage, whether before or after the breach thereof, or if the same be entirely due and payable, after a tender of the whole amount so due and payable thereon, and a tender of the lawful charges of such mortgagee, personal representative or assignee, shall, for the space of seven days after being requested so to do in writing by the parties interested, refuse or neglect to discharge the same, as provided in this act, or to deliver up such chattel mortgage to the mortgagor after performance or tender as aforesaid, or to execute and deliver a discharge or release of such chattel mortgage, he shall be liable to the mortgagor, his heirs or assigns, in the sum of twenty-five dollars-damages, and also for all actual damages occasioned by such neglect or refusal, to the person who shall perform the conditions of such mortgage, or make such tender to the mortgagee, his representative or assigns, or to any one who may have an interest in the mortgaged property, to be recovered in an action on the case, or be awarded by a court of equity, upon a bill filed to procure a discharge or a release of such mortgage, with double costs, in the discretion of the court.

672. Minnesota.¹ — Whenever any mortgage of personal property filed under the provisions therefor has been paid, or the conditions thereof satisfied, the mortgagee, or his assignee or personal representatives, shall give a certificate in writing under his hand, stating the date of the mortgage and a description of the property thereby mortgaged, and that the same has been discharged in full; and on delivering said certificate in writing to the officer with whom such mortgage is filed, the said officer shall deliver said mortgage to the person producing said certificate, and shall file said certificate in his office, and shall keep and preserve said

¹ G. S. 1878, ch. 39, § 13.

certificate among the records in his office, and shall write the word "Satisfied," with the date, opposite to such mortgage, in the book in which such mortgages are entered.

673. Mississippi.¹ — Any mortgagee or *cestui que trust* of real or personal estate, having received full payment of the money due by such mortgage or deed of trust, shall, at the request of the mortgagor or grantor, enter satisfaction upon the margin of the record of such mortgage or deed of trust, in the clerk's office, which entry shall discharge and release the same, and shall bar all actions or suits brought thereon, and the title shall thereby revert in the grantor.² And if such mortgagee or *cestui que trust*, by himself or his attorney, shall not, within three months after request and tender made for his reasonable expenses, repair to the proper office, and there make acknowledgment of satisfaction as aforesaid, the person so neglecting or refusing shall, for such offence, forfeit and pay to the party aggrieved any sum not exceeding the mortgage money, to be recovered by action in any court of competent jurisdiction; but such entry of satisfaction may be made by any one authorized to do it, by the written authorization of the mortgagee or beneficiary, and shall have the same effect as if done by the mortgagee or beneficiary; and where the entry of satisfaction is made under the written authorization aforesaid, the mortgagor or grantor, or his heirs or assigns, shall be entitled to the custody of the writing conferring the authority, unless it shall be duly acknowledged and recorded in the office in which the mortgage or deed of trust is recorded.

Payment of the money secured by any mortgage or deed of trust shall extinguish it, and revert the title in the mortgagor as effectually as a reconveyance would.

374. Missouri.³ — If any mortgagee, *cestui que trust*, or assignee, or the executor or administrator of either, receive full satisfaction of any mortgage or deed of trust, he shall, at the request and cost of the person making the same, acknowledge satisfaction of the mortgage or deed of trust, on the margin of the record

¹ Code 1880, §§ 1206, 1207.

² R. S. 1879, §§ 3311, 3312; amended

³ Such entry is equivalent to a release by deed. *Mairs v. Bank of Oxford*, 58 p. 225. Miss. 919.

thereof, or deliver to such person a sufficient deed of release of the mortgage or deed of trust ; but it shall not in any case be necessary for the trustee to join in such acknowledgment of satisfaction or in such deed of release. When any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by an assignee, the note or notes secured shall be produced and cancelled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature. If such note or notes have been lost or destroyed, the assignee shall, before acknowledging satisfaction, make affidavit that he is the lawful owner thereof, that the same has been paid but cannot be produced for the reason that it has been lost or destroyed, as the case may be ; which affidavit shall be entered on the face or margin of the record, or be appended thereto.

If any such person thus receiving satisfaction do not, within thirty days after request and tender of costs, acknowledge satisfaction on the margin of the record, or deliver to the person making satisfaction a sufficient deed of release, he shall forfeit to the party aggrieved ten per cent. upon the amount of the mortgage or deed of trust money absolutely, and any other damages he may be able to prove he has sustained, to be recovered in any court of competent jurisdiction.

674 a. Montana Territory.¹— Whenever the debt or obligation secured by any mortgage of personal property, which has been filed in the office of the recorder of deeds as provided in this chapter, shall be paid or discharged, an acknowledgment of satisfaction signed by the mortgagee, his legal representative or assigns, must be indorsed upon the mortgage, or copy thereof filed as aforesaid, and the fact of such discharge and satisfaction noted by the recorder in the book kept by him, opposite the names of the parties to such mortgage.

675. Nebraska.²— A mortgage of personal property filed as provided by statute, when satisfied, shall be discharged by an

¹ Comp. Stats. 1887, § 1552.

² Comp. Stats. 1885, ch. 32, § 15.

entry by the mortgagee, his agent or assignee, on the margin of the index, which entry shall be attested by the clerk without fee.

The county clerk may also discharge a mortgage on the presentation or receipt of an order in writing signed by the mortgagee thereof, and attested by a justice of the peace or some officer with a seal. Any mortgagee, assignee, or their legal personal representatives, after full performance of the conditions of the mortgage, who for the space of ten days after being requested shall refuse or neglect to discharge the same as provided in this section, shall be liable to the mortgagor, his heirs or assigns, in the sum of fifty dollars damages; and also for all actual damages sustained by the mortgagor occasioned by such neglect or refusal, said damages to be recovered in the proper action.

676. New York.¹—Whenever any mortgagor, or any person obtaining title to mortgaged property, shall present to any recorder, county or town clerk, in whose office a chattel mortgage executed by said mortgagor on such property may be filed, a certificate from the mortgagee therein named, or the holder or owner thereof, that such mortgage is paid or satisfied, it shall be the duty of such recorder, or either of the clerks above mentioned, to file such certificate in his office and discharge such mortgage, by writing in the book kept by such recorder, or either of such clerks, and opposite the entry therein of such mortgage, the word “Discharged,” with the date thereof.

676 a. New Jersey.²—When a mortgage is paid, it is the duty of the clerk of the court of common pleas of the county in which the mortgage is recorded, on application to him by the mortgagor or person redeeming or paying the mortgage, and producing to him the mortgage cancelled, or a receipt upon it signed by the mortgagee, his representatives or assigns, to enter in a margin to be left for that purpose, opposite to the abstract or record, a minute of the redemption or payment; which minute is a full and absolute bar to and discharge of the entry and mortgage.

677. New Mexico.³—When any mortgage of personal prop-

¹ Laws 1879, ch. 171, § 1.

³ Comp. Laws 1884, § 1594.

² Nixon's Dig. 1868, p. 611; R. S. 1877, p. 706.

erty shall have been fully paid and satisfied, it shall be the duty of the mortgagee, his assignee or personal representative, to enter satisfaction, or cause satisfaction thereof to be entered of record, under the head of "Remarks," on the record of mortgages; and any mortgagee, or assignee of such mortgagee, who shall neglect or refuse to enter satisfaction of such mortgage, as is provided by this act, shall be liable in damages to such mortgagor, his grantee or heirs, in the sum of one hundred dollars, to be recovered in a civil action before the district court; and the sum of one hundred dollars aforesaid shall be regarded as fixed and liquidated damages in any such case.

678. North Carolina.¹—Any deed of trust or mortgage which has been registered may be discharged and released in the following manner, to wit: the trustee or mortgagee, or his or her legal representative, or the duly authorized agent or attorney of such trustee, mortgagee, or legal representative, may, in the presence of the register of deeds, acknowledge the satisfaction of the provisions of such trust or mortgage; whereupon it shall be the duty of the register forthwith to make, upon the margin of the record of such trust or mortgage, an entry of such acknowledgment of satisfaction, which shall be signed by the said trustee, mortgagee, legal representative, or attorney, and witnessed by the register, who shall also affix his name thereto; and every such entry thus acknowledged and witnessed shall operate and have the same effect to release and discharge all the interest of such trustee, mortgagee, or representative in such deed or mortgage as if a deed of release or reconveyance thereof had been duly executed and recorded.

679. Pennsylvania.²—Any mortgagee of any real or personal estates, having received full satisfaction and payment of all such sum and sums of money as are really due to him by such mortgage, shall, at the request of the mortgagor, enter satisfaction upon the margin of the record of such mortgage recorded in the said office, which shall forever thereafter discharge, defeat, and release the same, and shall likewise bar all actions thereupon. If he does not by himself or his attorney, within three months after

¹ Battle's Revisal 1873, ch. 35, § 29; Code 1883, § 1271.

² 1 Brightly's Purdon's Dig. 1883, p. 592, §§ 139, 140.

such request and a tender of his reasonable charges, repair to the office for recording deeds, and there make such acknowledgment, he shall forfeit and pay to the party aggrieved any sum not exceeding the mortgage money, to be recovered by suit.

680. Texas.¹ — When the debt secured by a chattel mortgage shall have been paid or satisfied, it shall be the duty of the mortgagee, his assignee or personal representative, to enter or cause to be entered satisfaction thereof. Such entry of satisfaction shall be made in the book in which the instrument is entered, which may be done under the head of "Remarks;" and any instrument acknowledging satisfaction need not be recorded at length, but it shall be sufficient for the mortgagee or clerk to make an appropriate entry under the head of "Remarks," showing that the same has been paid; and if there is a separate instrument acknowledging satisfaction, it may be filed with the original instrument or copy thereof, and preserved therewith in the office of the county clerk.

680 a. Utah Territory. — A mortgage of personal property, when the mortgage debt is satisfied, shall be released by the mortgagee in the same manner as is provided for the release of mortgages of real property.²

680 b. Vermont.³ — Mortgages on personal property may be discharged by the mortgagee, his assignee, administrator, executor, agent, or attorney, in the same manner as mortgages on real estate.

If any mortgagee, his assignee, executor, or administrator, after performance of the condition of said mortgage, before or after the breach thereof, or after tender of performance of said condition, at or after the time fixed for the performance of the same in said mortgage, shall not, within ten days after being thereto requested by any person entitled to redeem, discharge said mortgage on the record thereof, such person entitled to redeem may recover of the person, whose duty it is to discharge the same, ten dollars for such neglect, and all damages occasioned thereby, in an action on the case.

¹ R. S. 1879, Appendix, p. 15, § 5.

³ Laws 1882, p. 70, §§ 1, 2.

² Laws 1884, ch. 21, § 2.

CHAPTER XV.

REDEMPTION : 681-698.

681. By the old common law, a mortgage of personal property gave an absolute title to the mortgagee on breach of the condition. No process of foreclosure was necessary, and there was no right of redemption.¹ It is true that some authorities held that the mortgagor might, within a reasonable time after forfeiture, maintain a bill in equity to redeem ; but this right was neither clearly settled as a rule nor generally admitted ; or at least it was not generally so admitted until after the equitable right to redeem mortgaged real estate had become fully established. But the same reasons that induced courts of equity to interfere to relieve a mortgagor of realty after forfeiture have operated to induce a like interference to relieve a mortgagor of chattels. The hardship and injustice of allowing the mortgagee to insist upon a forfeiture in the case of a mortgage of chattels are just as obvious as in the case of a mortgage of real estate. The principles of equity, therefore, upon which the right of redemption should be allowed, are the same in both cases.²

¹ *Taber v. Hamlin*, 97 Mass. 489, per Foster, J. ; *Burtis v. Bradford*, 122 Mass. 129, per Endicott, J.

In New Hampshire, prior to the statute of July 4, 1834, conferring general chancery powers in relation to the redemption and foreclosure of mortgages, there was no provision for a redemption of mortgaged personal property after forfeiture, and the authorities show that upon non-performance of the condition the proper ty became absolute in the mortgagee. *Wendell v. New Hampshire Bank*, 9 N. H. 404, 420, per Parker, C. J.

Whether a mortgagor of chattels has an equity of redemption after forfeiture, was left as an unsettled question in a recent case before the Supreme Court of In-

diana ; with an intimation, however, that such a right exists, inasmuch as it has been held in that state that a mortgagee of chattels may maintain an action to foreclose the equity of redemption. *Sidener v. Bible*, 43 Ind. 230. For if there is an equity of redemption which may be foreclosed, it would seem to follow that there is an equity of redemption by virtue of which the mortgagor may redeem. *Woodward v. Wilcox*, 27 Ind. 207 ; *Tritipo v. Edwards*, 35 Ind. 467 ; *Blakemore v. Taber*, 22 Ind. 466 ; *Broadhead v. McKay*, 46 Ind. 595.

² *Flanders v. Chamberlain*, 24 Mich. 305, 313, per Christiancy, J. ; *Davis v. Hubbard*, 38 Ala. 185, 189, per Walker, C. J.

Not only the mortgagor, but any one holding his interest in the property, as for instance a judgment creditor, may redeem.¹

The mortgage vests the legal title to the property in the mortgagee, defeasible at law upon the performance of the condition; but upon default, the mortgage becomes indefeasible at law, and defeasible only in equity, where the mortgage is considered only as a security for the debt, and the mortgagor is permitted to redeem, notwithstanding his default.²

682. A mortgagor cannot debar himself of his equitable right to redeem by an agreement in the mortgage deed to give up all claim to the mortgaged property upon his failure to pay the debt secured at maturity.³

A delivery of the mortgaged property by the mortgagor to the mortgagee, in pursuance of a provision in the mortgage that upon default the mortgagor shall so deliver up the property, does not vest the absolute ownership of the property in the mortgagee, or free the property from the equity of redemption.⁴ But after the mortgagee has taken possession of the mortgaged property with the consent of the mortgagor, the latter may make an oral release or gift to him of the equity of redemption. The mortgagor after such release or gift has no attachable interest.⁵

683. It is a general rule that the only right of the mortgagor after forfeiture is an equitable right to redeem.⁶ He has no legal right to redeem except where such a right is given by statute. A statute which converts the equitable right of the mortgagor into a legal right, of course gives the mortgagor a remedy at law for an infringement of his rights. But this remedy at law must be sought agreeably to the ordinary rules affecting other actions at law. The mortgagor cannot maintain trespass against the mortgagee, in case he sells, disposes of, injures, or destroys the mortgaged property in such a manner as to destroy or impair his right to redeem, because the mortgagor has neither the property nor any right of possession; but he may in such case maintain an

¹ *Lambert v. Miller*, 38 N. J. Eq. Y.), 236; *Lavigne v. Naramore*, 52 Vt. 117.

² *Evans v. Merriken*, 8 Gill & J. (Md.) 39.

³ *Bunacleugh v. Poolman*, 3 Daly (N.

See 2 Jones on Mortgages, § 1045.

⁴ *Landers v. George*, 49 Ind. 309.

⁵ *Stone v. Jenks*, 142 Mass. 519.

⁶ *Boyd v. Beaudin*, 54 Wis. 193, 198.

action on the case; and in that form of action he would be entitled to recover damages justly proportionate to the injuries sustained.¹

It has been held by some courts, however, that a court of equity has jurisdiction after forfeiture to enjoin an action at law by the mortgagee for the mortgaged property when the mortgagor alleges that the debt has been paid, but it appears that the mortgagee has not accepted the payment and has not released his title.²

684. The fact that the property is no longer in the mortgagee's possession, and that he cannot restore it upon a decree in favor of the mortgagor, does not enable the latter to recover damages at law for a wrongful sale of the property, instead of pursuing his remedy in equity. This is certainly the case if the mortgagee has received from the sale less than the whole mortgage debt. "Relief in equity can be granted, *ex æquo et bono*, only upon payment or tender of payment of the whole mortgage debt. That must be averred and proved; and it lays the foundation of the only remedy of the plaintiff in this case. Had the sale of the mortgaged property realized sufficient to have satisfied the debt, together with the costs and expenses of sale, then, perhaps, a tender would not be necessary. But it was not so in this case. There remains, after applying the proceeds of the sale, a considerable amount of the mortgage debt still unpaid; and before the defendant can be prosecuted in any form of action, whether for unfairly disposing of the property or otherwise, he must be paid or have tendered to him the balance due."³

Although the mortgagee has disposed of the property, a court of equity can give complete relief by decreeing damages. Such damages would be assessed under issues properly framed and sent to a jury to be tried.⁴ But the mortgagee, in case he has disposed of a portion of the property, cannot be compelled, in an action to redeem, to become a purchaser of such portion, or to account for it as upon a purchase at a valuation fixed by the court. If on accounting it appears that he has received sufficient from the pro-

¹ Leach v. Kimball, 34 N. H. 568. Pr. 296, 306, per Monell, J.; S. C. 32 N.

² Davis v. Hubbard, 38 Ala. 185; and Y. Superior Ct. 54; S. C. 7 Abb. Pr. N. S. 309.

see Smith v. Quartz Mining Co. 14 Cal. 242.

⁴ Stoddard v. Denison, *supra*.

³ Stoddard v. Denison, 38 How. (N. Y.)

ceeds of the goods sold by him to pay the mortgage debt, the goods remaining in his possession should be adjudged to belong to the plaintiff.¹

If the mortgagee has disposed of the mortgaged property so that he cannot redeliver it upon a decree in favor of the mortgagor, the latter may have a decree for the amount or value of his interest in the property;² and this value will be estimated as of the time when the mortgagee disposed of the property.³

685. Generally the right to redeem is enforced in equity without the aid of any statute. The established equitable doctrine is, that although upon the breach of the condition of a mortgage the title at law becomes absolute in the mortgagee, the mortgagor may come into a court of equity to redeem within a reasonable time, if the mortgagee has not barred the equity of redemption by foreclosure or sale.⁴ This may be regarded as a settled rule in every state whose courts have full equity powers, and where redemption has not been specially provided for by statute.

686. A bill in equity to redeem a mortgage cannot be maintained in states in which a remedy is provided by statute, as is the case in Massachusetts, unless a case is disclosed where, from the nature of the property mortgaged, the peculiar relation of the parties, or the difficulty of ascertaining the amount to be paid or tendered, it is apparent that the mode specifically provided by statute for redemption will not fully protect the mortgagor's rights.⁵ Ordinarily, where the debt or duty of the

¹ *Bragelman v. Daue*, 69 N. Y. 69.

² *Blodgett v. Blodgett*, 48 Vt. 32; *Boyd v. Beaudin*, 54 Wis. 193.

³ *Mowry v. First Nat. Bank*, 54 Wis. 38.

⁴ *Flanders v. Barstow*, 18 Me. 357; *West v. Crary*, 47 N. Y. 423; *Charter v. Stevens*, 3 Den. (N. Y.) 33; *Pratt v. Stiles*, 17 How. (N. Y.) Pr. 211; *S. C.* 9 Abb. Pr. 150; *Stoddard v. Denison*, 38 How. (N. Y.) Pr. 296; *Hinman v. Judson*, 13 Barb. (N. Y.) 629; *Patchin v. Pierce*, 12 Wend. (N. Y.) 61; *Bragelman v. Daue*, *supra*; *Dupuy v. Gibson*, 36

Ill. 197; *Hammers v. Dole*, 61 Ill. 307; *Wylder v. Crane*, 53 Ill. 490; *Waite v. Dennison*, 51 Ill. 319; *Foster v. Ames*, 1 Lowell, 313; *Flanders v. Thomas*, 12 Wis. 410; *Smith v. Coolbaugh*, 21 Wis. 427; *Saxton v. Williams*, 15 Wis. 292; *Wilson v. Brannan*, 27 Cal. 258; *Heyland v. Badger*, 35 Cal. 404; *Blodgett v. Blodgett*, *supra*; *Van Brunt v. Wakelee*, 11 Mich. 177; *Tannahill v. Tuttle*, 3 Mich. 104; *Flanders v. Chamberlain*, 24 Mich. 305; *Lambert v. Miller*, 38 N. J. Eq. 117.

⁵ *Gordon v. Clapp*, 111 Mass. 22.

mortgagor is ascertained and fixed, and the property mortgaged will pass by delivery, the statutory provisions furnish an effectual mode of protecting the rights of the mortgagor, and there is no occasion for the intervention of a court of equity.¹ The fact that the mortgage was given for a very much larger sum than was actually due, and was made to secure the property to the mortgagor in fraud of his creditors, may be availed of as effectually at law as in equity; and, indeed, if there be any remedy at all, it is at law, because a party cannot be heard to allege his own turpitude as ground for relief in equity.²

When, however, it is impossible for the mortgagor to ascertain the amount due upon the mortgage, as he must at his peril tender a sufficient sum, the remedies provided by the statute may not afford the full relief to which he is entitled, and he may have the amount determined in equity.³

When, moreover, the mortgaged property is of such a nature that the statutory provisions do not apply, resort to a bill in equity may be had to protect the mortgagor. Thus, if the property consist in part of an interest in patent rights, which is incorporeal property incapable of transfer by delivery, an action of replevin is inapplicable to it, and the mortgagor can only be reinstated in the possession of the property by a reconveyance; and this can be decreed only in equity.⁴

687. How long the mortgagor's right of redemption in equity continues after the mortgagee has taken possession of the property is a question upon which the cases are not clear. It is stated in general terms that a bill to redeem must be brought within a reasonable time.⁵ What constitutes such reasonable time must either be determined by a court of equity, or by a statute of limitations specially applicable to the case.⁶ There is a difference in this respect between a redemption from a mortgage of real estate and a mortgage of personalty, growing out of the transitory nature of personal property as compared with realty. The time within which a mortgage of realty may be redeemed is

¹ *Boston & Fairhaven Iron Works v. Montague*, 108 Mass. 248, per Morton, J.

² *Gordon v. Clapp*, 111 Mass. 22.

³ *Boston & Fairhaven Iron Works v. Montague*, *supra*; *Bushnell v. Avery*, 121 Mass. 148.

⁴ *Boston & Fairhaven Iron Works v. Montague*, *supra*.

⁵ 2 Story Eq. § 1031.

⁶ *Stoddard v. Denison*, 38 How. (N. Y.) Pr.296; *Hatfield v. Montgomery*, 2 Port. (Ala.) 58.

determined from analogy with the statutory period within which a right of entry may be made upon lands.¹ But a different consideration must determine the time within which a mortgage of personalty must be redeemed after the mortgagee has taken possession; and that consideration is found in the nature of the property. It is not fixed in place. It may be readily sold and removed, and possession enables the mortgagee to give good title to it by sale. It is, moreover, in general, liable to be consumed in use or in some way destroyed. Therefore, if the mortgagor wishes to redeem, it is reasonable that he should be required to assert his right within a reasonable time. That reasonable time may well be determined by analogy to the statute of limitations applicable to actions at law for the recovery of personal property.²

688. The time within which redemption must be made is to be counted from the beginning of the mortgagee's adverse possession. Therefore, if there be no adverse possession on the part of the mortgagee as for instance where he holds possession under an agreement whereby the property is left in his possession, and he is to continue to have the use and receive the earnings of it until the debt is paid, no length of time will bar the right of redemption.³ If a mortgagee waive a forfeiture by accepting a partial payment of the debt, the time for redemption commences to run again from the time when such partial payment was made.⁴

¹ 2 Jones on Mortgages, 1144. From analogy, would not the statute limiting actions of trover hold the same relation to the redemption of chattel mortgages that the statute enacting the right of entry holds to the redemption of mortgages of real estate?

² Byrd v. McDaniel, 33 Ala. 18; Humphres v. Terrell, 1 Ala. 650; Perry v. Craig, 3 Mo. 516; Baker v. Baker, 13 B. Mon. (Ky.) 406; Greene v. Dispeau, 14 R. I. 575. In the latter case Durfee, C. J., said: "Evidently twenty years is unreasonably long; for personal property is not permanent and indestructible like real estate, but ordinarily it is movable, liable to be lost, perishable from use or time, and, even when it consists of shares of stock, subject to great fluctuations in value.

If six years is long enough for an action at law where personal property belonging to one person has been appropriated by another, we see no reason why, in the absence of fraud or some other special ground of equitable relief, six years is not likewise long enough for the institution of a suit to redeem a chattel mortgage, where the mortgagee in possession, having an absolute title at law, ceases to recognize any right in the mortgagor and treats the property as his own. Indeed, it is difficult to see why, in such a case, equity should not follow the law and hold the mortgage irredeemable at the end of sixty days after default."

³ Bartlett v. Thynes, 2 Hill (S. C.) Eq. 171.

⁴ Winchester v. Ball, 54 Me. 558.

The possession of the mortgagor is not adverse to the mortgagee until a forfeiture, and not then if the mortgagor recognizes the mortgage as a subsisting obligation, by making payments or otherwise.¹ If the mortgagor has his whole lifetime within which to pay, there is no forfeiture until his death.²

What is a reasonable time within which to bring a bill to redeem must be determined in each particular case according to the attendant circumstances.³

689. In some states a right of redemption after forfeiture is provided for by statute, and where that is the case redemption must be made within the time so allowed, or the title of the mortgagee becomes absolute.⁴

In Maine,⁵ Massachusetts,⁶ and Minnesota,⁷ it is provided by statute that redemption may be had only within sixty days after notice has been given by the mortgagee of his intention to foreclose. In Rhode Island it is provided that the mortgagor may redeem at any time within sixty days after forfeiture.⁸ In New Hampshire⁹ and Vermont¹⁰ the mortgagee may sell the property at any time after thirty days from the time of condition broken, upon giving, in the former state, four days' notice of the sale, and in the latter state ten days' notice. In Delaware the mortgagee may proceed at law for the enforcement of his mortgage after default for the space of sixty days.¹¹ In Florida the petition for foreclosure must be filed in the office of the clerk of court at least two months before the term of the court at which judgment of foreclosure shall be demanded or rendered.¹²

In Missouri sixty days' notice must be given of an intended foreclosure of a mortgage of chattels, and there must also be given thirty days' notice of the time and place of sale.¹³ In Pennsylvania¹⁴ thirty days' notice of the sale must be given, and in South Carolina fifteen days' notice must be given.¹⁵

¹ *Joyner v. Vincent*, 4 Dev. & Bat. (N. H.) 512.

² *Joyner v. Vincent*, *supra*.

³ *Lavigne v. Naramore*, 52 Vt. 267.

⁴ *Winchester v. Ball*, 54 Me. 558; *Clapp v. Glidden*, 39 Me. 448. See *Greene v. Bispeau*, 14 R. I. 575.

⁵ § 730.

⁶ § 732.

⁷ § 734.

⁸ § 748.

⁹ § 740.

¹⁰ § 753.

¹¹ § 721.

¹² § 722.

¹³ § 736.

¹⁴ § 747.

¹⁵ § 749.

In Kentucky it is provided by statute that after a mortgagee of personal property, or any person claiming under him, has had five years' continued adverse possession, no action shall be brought by the mortgagor, or any one claiming under him, to redeem it.¹

689 a. There are many circumstances which would in equity extend the time within which redemption may be made under a statute which limits the time to a certain number of days after forfeiture, as in Rhode Island. Thus, if the mortgagee allows the mortgagor to remain in possession for a considerable time after the statutory time for redemption at law has elapsed, without making any effort to take possession of the property or to foreclose the mortgage, it might be construed that he had granted further indulgence to the debtor, which would in equity entitle him to redeem.²

690. A bill to redeem must in substance make a tender of the amount due upon the mortgage. It need not offer in express words to pay what may be found due, but it must in substance do this. A bill which sets forth the facts upon which the right to redeem depends, and alleges that an amount stated was due upon a certain day, and that the complainant had offered to pay that amount, is held to contain all that is requisite in a bill to redeem, when the question arises upon the merits of the case without a demurrer.³ If a tender be not made in the bill, a tender or payment of the whole debt prior to bringing the bill must be proved.⁴ The want of an actual tender before bringing suit does not defeat the action, but only goes to the question of costs.⁵

In New York, in order to redeem, the mortgagor must pay or tender the whole debt in good faith before suit is brought.⁶ Such payment or tender must be averred and proved as the foundation of the mortgagor's remedy.⁷

¹ R. S. 1873, p. 635.

² *Arnold v. Chapman*, 13 R. I. 586.

³ *Flanders v. Chamberlain*, 24 Mich. 305; and see *Lavigne v. Naramore*, 52 Vt. 267.

See, also, 2 *Jones on Mortgages*, § 1095.

⁴ *Halstead v. Swartz*, 1 T. & C. (N. Y.) 559; *Tallon v. Ellison*, 3 Neb. 63, 74; *Adams v. Nebraska City Nat. Bank*, 4

Neb. 370; *Lambert v. Miller*, 38 N. J. Eq. 117.

⁵ *Boyd v. Beaudin*, 54 Wis. 193.

⁶ *Hall v. Ditson*, 55 How. Pr. 19; *S. C.* 5 Abb. N. C. 198; *Stoddard v. Denison*, 38 How. Pr. 296; *S. C.* 32 N. Y. Superior Ct. 54; *S. C.* 7 Abb. Pr. 309; *Halstead v. Swartz*, 46 How. Pr. 289, 291.

⁷ *Stoddard v. Denison*, *supra*.

When it is necessary for the mortgagee to render an account in order that the mortgagor may know what sum he must pay in order to redeem, no tender is necessary before bringing the action. Therefore where a mortgagee has received money for the use of the mortgaged property, and also from an unlawful sale of part of it, the mortgagor may without a tender maintain a suit in equity to charge the mortgagee with the moneys thus received, and to redeem the unsold part on payment of any sum which may be found due upon accounting.¹

On a bill to redeem, the mortgagee is not entitled to require payment of other debts owed him by the mortgagor before redemption is allowed.²

691. Any one may redeem who has a substantial interest in the property, or a lien upon it. An attaching creditor may redeem as soon as his attachment or execution becomes a lien; and an execution creditor has the right to redeem as soon as he has acquired a lien by levy of his execution.³ A second mortgagee may redeem until his right is cut off by the foreclosure of the first mortgage.⁴ A purchaser from the mortgagor acquires his right of redemption.⁵

692. Acceptance of part payment of the mortgage debt, after the expiration of the time allowed by statute for redemption, is a waiver of the forfeiture; and the time for redemption commences to run again from the time when the last partial payment was made and accepted.⁶ The time of payment may also be extended by parol agreement, and redemption may be had within such extended time.⁷

A mortgagee may waive a forfeiture after the time of redemption allowed by statute has expired, and thereby extend the time of performance. He may make such waiver even after he has sold the property, and thereby entitle the mortgagor to recover

¹ *Boyd v. Beandin*, 54 Wis. 193.

⁴ *Treat v. Gilmore*, 49 Me. 34; *Smith*

² *Clarke v. Robinson*, 15 R. I. 231; 13 Atl. Rep. 124.

v. Coolbaugh, 21 Wis. 427.

⁵ *Scott v. Henry*, *supra*.

³ *Lucking v. Wesson*, 25 Mich. 443;

⁶ *Winchester v. Ball*, 54 Me. 558;

Hinman v. Judson, 13 Barb. (N. Y.) 629;

Flanders v. Barstow, 18 Me. 357.

Scott v. Henry, 13 Ark. 112, 128.

⁷ *Deshazo v. Lewis*, 5 Stew. & P. (Ala.)

See 2 Jones on Mortgages, §§ 1055-1069.

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of him the surplus proceeds over the amount due upon the mortgage.¹

693. Foreclosure is a bar to redemption.² After a mortgage upon which anything was due has been legally foreclosed, the mortgagor has no right to bring a bill to redeem, and have the exact amount due on the mortgage determined.³

A foreclosure sale under a first mortgage, not shown to be fraudulent, bars the equity of redemption, not only of the mortgagee, but of any junior mortgagee.⁴

A sale under a power in a prior mortgage bars and forecloses the equity of redemption of the mortgagor, and also of the mortgagee under a junior mortgage.⁵

If, after the foreclosure of a chattel mortgage without a sale of the property, the mortgagee obtains a judgment against the mortgagor, not for a deficiency, but for the whole amount of the original mortgage debt, the mortgage is thereupon opened for redemption. The obtaining of such judgment is presumptively a waiver or disclaimer of the foreclosure.⁶

In case the mortgage secured distinct debts to two persons, and after foreclosure one mortgagee assigned his debt to the other, who subsequently recovered judgment for the amount of his original debt, the whole of the mortgaged property is not thereby opened to redemption, but only so much as, upon apportioning it between the two debts, would correspond to the debt for which judgment was taken.⁷

694. Upon a foreclosure suit by a junior mortgagee, he can sell nothing more than the equity of redemption, or the mortgagor's interest which passed to him, unless the prior mortgagee is in a condition to foreclose and consents to a sale of the entire property. In a proper case he is entitled to a decree declaring his right to redeem, and to sell, in order to repay the redemption money, as well as to satisfy his own debt. Thus, where the prior mortgage secures rent for a term of years, falling due quarterly,

¹ *Thompson v. Moore*, 36 Me. 47.

² See § 821.

³ *Burtis v. Bradford*, 122 Mass. 129.
See 2 *Jones on Mortgages*, § 1048.

⁴ *Wylder v. Crane*, 53 Ill. 490.

⁵ *Wylder v. Crane*, *supra*.

⁶ *Hazard v. Robinson*, 15 R. I. 226;
Clarke v. Robinson, 15 R. I. 231; 13 Atl.
Rep. 124.

⁷ *Clarke v. Robinson*, *supra*.

ne of the instalments being past due, the junior mortgagee may ke a prior mortgagee a party to ascertain the *status* of his rtgage, to redeem as to past due instalments, and to sell the perty to meet the debt to be redeemed; in which event the ole property may be sold to repay the redemption money, as ll as the second mortgage debt, enough of the proceeds being d to meet the subsequent instalments of the first mortgage. t if there are no past due instalments, the sale must be made ject to the prior mortgage.¹

695. What effect the mortgagee's taking possession after feiture has upon the mortgagor's equity of redemption is t very uncertain in some of the cases. In a case in Michigan was said that a mortgagor, notwithstanding a forfeiture of the dition, may redeem in equity at any time before the mortgagee s foreclosed by a reduction of the property into possession, or a sale pursuant to a power conferred by the mortgage.² But a later case in that state it was justly said, that the principle on which a bill for redemption is allowed at all is one which plies as well after the mortgagee may have taken possession before, if the bill be brought within a reasonable time.³ His ring possession of the mortgaged chattels no more cuts off the rtgagor's right of redemption than the like taking of posses- n of mortgaged real estate interferes with the mortgagee's ht to redeem.⁴

696. A mortgagee in possession, while the right of redemp- n exists, is liable to account for the income, profits, and prod- ds of the mortgaged chattels.⁵ It is immaterial whether the

Hays v. Cornelius, 3 Tenn. Ch. 461.

Van Brunt v. Wakelee, 11 Mich. 177.

a note referring to the decree of the rt below, it is said that so little author- is there on the subject, that the Circuit rt could only decide the case upon aral principles and the analogy of tel mortgages to mortgages of lands. eral cases were cited and referred to; in none of them does the court under- : to define precisely what acts of the tgagee, short of actual sale of the

property, will be sufficient to bar the equity of redemption.

³ Flanders v. Chamberlain, 24 Mich. 305, per Christiancy, J.

⁴ Flanders v. Chamberlain, *supra*, per Christiancy, J.

⁵ Covell v. Dolloff, 31 Me. 104; Craft v. Bullard, Sm. & M. (Miss.) Ch. 366; and see Moore v. Aylett, 1 Hen. & M. (Va.) 29; Whitin v. Paul, 13 R. I. 40; Isenberg v. Fausler (Kans.), 13 Pac. Rep. 573.

possession be before or after breach of the condition.¹ But the mortgagor cannot recover for the use of the property in an action of assumpsit. If he redeems, he is entitled to an account and to an allowance in the decree for the use had by the mortgagee. But if the mortgagee has sold the property under a power, or by virtue of any proceeding for foreclosure, the mortgagor may recover the surplus money received from the sale, after payment of the debt and charges, — the value of the use first being applied as part payment.²

An accounting for the rents and profits of chattels of which the mortgagee has had the possession and use is incident to the mortgagor's right to redeem, and is part of the relief ordinarily given in the suit.³ Most of the rules governing the matter of accounting by a mortgagee of real property are equally applicable to accounts by a mortgagee of chattels.⁴

697. A mortgagee in possession is responsible for ordinary diligence in the management and preservation of the property, both before and after condition broken, and while the right of redemption exists, and is liable for ordinary neglect.⁵ If the property be destroyed without fault on his part, he cannot, while thus holding it as security, be held to account for its value.⁶

A mortgagee in possession may charge the mortgagor with the expenses attending the care of the property. A subsequent mortgagee in possession of a crop, who has paid expenses of gathering the crop and preparing it for market, may charge such expenses not only against the mortgagor, but against a prior mortgagee, in

¹ *Osgood v. Pollard*, 17 N. H. 271, per Parker, C. J.

² *Osgood v. Pollard*, *supra*.

³ *Pratt v. Stiles*, 17 How. (N. Y.) Pr. 211; *S. C.* 9 Abb. Pr. 150; *Davis v. Hubbard*, 38 Ala. 185, 188, per Walker, C. J.; *Downing v. Palmateer*, 1 Mon. (Ky.) 64; *Franks v. Jones* (Kans.), 17 Pac. Rep. 663.

⁴ See 2 Jones on Mortgages, §§ 1114–1143.

As to annual rests, see 2 Jones on Mortgages, §§ 1139–1143, and *Morrow v. Turney*, 35 Ala. 131, 140.

⁵ *Wann v. Coe*, 31 Fed. Rep. 369. In this case a mortgagor, in order to get pos-

session of the mortgaged property from the mortgagee in possession, and to save it from probable loss from mismanagement and abandonment, the mortgagee's management and accounts being such as to afford proper subjects for investigation by a court, agreed with the mortgagee on a certain sum as the balance due. It was held that he did not preclude himself from invoking the aid of a court of equity to compel a true account from the mortgagee. A payment made under such agreement should be treated merely as an item to be credited to the mortgagor.

⁶ *Covell v. Dolloff*, 31 Me. 104; *Morrow v. Turney*, *supra*.

case such mortgagee has consented to the incurring of such expenses.¹

But where there are two mortgages upon a crop, and the first mortgagee not in possession advances money to the mortgagor in order to save the crop and prepare it for market, in excess of the amount secured by his mortgage, he is not entitled to the amount of such advances to the exclusion of the second mortgagee.²

698. A mortgagee in possession is not answerable for property tortiously removed without his agency or consent, either to the mortgagor or his sureties; nor is he answerable if the property be removed with his consent, when the mortgagor and his sureties concur in such consent.³

¹ McKennon v. May, 39 Ark. 442.

³ Savings Bank v. Downing, 16 N. H.

² Weathersbee v. Farrar, 97 N. C. 106. 187.

CHAPTER XVI.

THE MORTGAGEE'S RIGHTS AND REMEDIES AFTER FORFEITURE: 699-712.

699. Upon default the title to the mortgaged property becomes absolute in the mortgagee.¹ This was the ancient rule in regard to mortgages of real property. Upon forfeiture the land was wholly lost to the mortgagor. But even after a right in equity to redeem had been established in respect to mortgages of real property, forfeiture upon default continued to be the rule in respect to mortgages of personal property.² Forfeiture upon default is still the rule in respect to chattel mortgages, in a manner that it is not in respect to real estate mortgages. In nearly half the states a mortgage of real property has come to be regarded as merely a lien, and not a conveyance of the legal title. But a chattel mortgage is a transfer of the title to the mortgaged property, and not a lien upon it, even in those states in which a mortgage of real property is regarded as merely a lien upon it, and not a title to it in the mortgagee. Since the title of a mortgagee to real estate only becomes absolute after a strict foreclosure, or after a conveyance to him upon a foreclosure sale, while his title to personal property becomes absolute upon the mortgagor's default, a mortgage of personal property is in this respect a higher security than a mortgage of land.³ All legal claim on the part of the mortgagor is gone after forfeiture, and he cannot at law compel the mortgagee to receive the debt and restore the property.⁴

¹ New York: *Langdon v. Buel*, 9 Wend. 80; *Brown v. Bement*, 8 Johns. 96; *Ackley v. Finch*, 7 Cow. 290; *Butler v. Miller*, 1 N. Y. 496; *Fox v. Burns*, 12 Barb. 677; *Talman v. Smith*, 39 Barb. 390.

² *Byron v. May*, 2 Chand. (Wis.) 103; *Flanders v. Thomas*, 12 Wis. 410.

³ *Anderson v. Hunn*, 5 Hun (N. Y.), 79; *Fuller v. Acker*, 1 Hill (N. Y.), 473.

⁴ *Wood v. Dudley*, 8 Vt. 430; *Porter v. Parmly*, 34 N. Y. Superior Court, 398; *S. C.* 43 How. Pr. 445; *Charter v. Stevens*, 3 Denio (N. Y.), 33; *Hulsen v. Walter*, 34 How. (N. Y.) Pr. 385; *Bunacleugh v. Poolman*, 3 Daly (N. Y.), 236; *Dreyfus v. Cage*, 62 Miss. 733; *Turner v. Langdon*, 85 Mo. 438; *Reese v. Lyon*, 20 S. C. 17.

Upon a breach of the condition of a chattel mortgage an absolute title to the property thereupon vests in the mortgagee,¹ though equity may interfere to compel a redemption. If the mortgage debt be payable in instalments, the title of the mortgagee becomes absolute upon default in payment of the instalment that first falls due.²

700. No provision in the mortgage in regard to a sale or

¹ **Alabama**: *Brown v. Lipscomb*, 9 Port. 472; *Mervine v. White*, 50 Ala. 388.

California: *Heyland v. Badger*, 35 Cal. 404; *Moore v. Murdock*, 26 Cal. 514; *Wright v. Ross*, 36 Cal. 414; *In re Haake*, 2 Sawyer, 231.

Colorado: *Hammond v. Solliday*, 8 Colo. 610.

Illinois: *Rhines v. Phelps*, 3 Gilm. 455; *Larmon v. Carpenter*, 70 Ill. 549; *Constant v. Matteson*, 22 Ill. 546; *McConnell v. People*, 84 Ill. 583; *Simmons v. Jenkins*, 76 Ill. 479; *Durfee v. Grinnell*, 69 Ill. 371; *Pike v. Colvin*, 67 Ill. 227; *Fikes v. Manchester*, 43 Ill. 379.

Iowa: *Bean v. Barney*, 10 Iowa, 498.

Kentucky: *Brown v. Phillips*, 3 Bush, 656.

Maine: *Winchester v. Ball*, 54 Me. 558; *Flanders v. Barstow*, 18 Me. 357.

Minnesota: *Merchants' Nat. Bank v. McLaughlin*, 1 McCrary, 258; *S. C. 2* Fed. Rep. 128.

Mississippi: *Volney Stamps v. Gilman*, 43 Miss. 456; *Thornhill v. Gilmer*, 4 S. & M. 153.

Missouri: *Robinson v. Campbell*, 8 Mo. 365; *S. C. Ib.* 615; *Bowens v. Benson*, 57 Mo. 26; *State v. Adams*, 76 Mo. 605. 612; *State v. Carroll*, 24 Mo. App. 358.

Nevada: *Bryant v. Carson River Lumbering Co.* 3 Nev. 313.

New Hampshire: *Leach v. Kimball*, 34 N. H. 568.

New Jersey: *Hall v. Snowhill*, 2 Gr. (N. J. L.) 8. In *Woodside v. Adams*, 40 N. J. L. 417, 427, *Depue, J.*, says: "After his debt has become due, the mortgagee has the absolute legal title in the sense that he may resort to such remedies as a

legal title draws to it for the enforcement and protection of his security, and to compel the payment of the mortgage money, just as a mortgagee of lands after default is regarded as having a legal title for the purposes of an action of ejectment to recover possession of the mortgaged premises. But still the mortgagor is considered as having an interest in the chattels mortgaged which continues, notwithstanding the mortgagee has recovered the chattels, or taken them into possession in virtue of his legal title, until the mortgagor's interest is extinguished by foreclosure or a sale in the manner provided by law."

New York: *Ackley v. Finch*, 7 Cow. 290; *Langdon v. Buel*, 9 Wend. 80; *Fulmer v. Acker*, 1 Hill, 473; *Patchin v. Pierce*, 12 Wend. 61; *S. C. 1* Hill, 473; *Hulsen v. Walter*, 34 How. Pr. 385.

South Carolina: *Moody v. Haselden*, 1 S. C. 129; *Wolff v. Farrell*, 3 Brev. 68; *Treseott v. Smyth*, 1 McCord (Ch.), 486; *Reese v. Lyon*, 20 S. C. 17; *McClendon v. Wells*, 20 S. C. 514.

Vermont: *Blodgett v. Blodgett*, 48 Vt. 32.

Wisconsin: *Nichols v. Webster*, 1 Chand. 203; *Smith v. Phillips*, 47 Wis. 202; *Mugat v. Pumpelly*, 46 Wis. 660; *Flanders v. Thomas*, 12 Wis. 410; *Smith v. Coolbaugh*, 21 Wis. 427; *Smith v. Konst*, 50 Wis. 360; *S. C. 7* N. W. Rep. 293; *Lowe v. Wing* (Wis. 1882), 13 N. W. Rep. 892.

² *Flanders v. Barstow*, *supra*; *Murray v. Erskine*, 109 Mass. 597; *Halstead v. Swartz*, 1 T. & C. (N. Y.) 559; *Pulver v. Richardson*, 3 Ib. 436; *Burton v. Tannehill*, 6 Blackf. (Ind.) 470.

the payment of the surplus to the mortgagor prevents the title becoming absolute upon default without a sale. Although the mortgage provide that upon default of payment, the mortgagee may sell the property at auction or private sale and pay the debt out of the proceeds, his title becomes absolute at law upon default in payment without any sale being made. The power of sale does not debar him of his common law rights under the mortgage; nor does it extend the time of payment, nor in any way reinvest the mortgagor with title to the property.¹ Nor does any irregularity in an attempted sale of the property by the mortgagee under a power, or otherwise, deprive him of his right to take possession of the property.² Nor does a stipulation, that the mortgagee shall pay over to the mortgagor the proceeds of any sale of the goods after satisfying the mortgage debt, bind the mortgagee to foreclose his mortgage.³

701. In Michigan, however, it is settled that the title of the mortgagee does not become absolute until he has done some act equivalent to a foreclosure, which must usually be by sale. He does not become the absolute owner of the property by a breach of condition.⁴ Upon a foreclosure sale of the property, the proceeds are to be treated as moneys collected to apply on the security, and do not belong to the mortgagee beyond the extent of his lawful claim as a creditor. This view seems also to be adopted in Oregon.⁵

702. The mortgagee is not bound, upon taking possession for condition broken, to foreclose his mortgage by a sale, although the mortgage contain a stipulation that he shall pay over to the mortgagor the proceeds of the sale, after satisfying the mortgage debt.⁶ His failure to sell the property does not make

¹ *Burdick v. McVanner*, 2 Den. (N. Y.) 170; *Jefferson v. Barkto*, 1 Bradw. (Ill.) 568; *Durfee v. Grinnell*, 69 Ill. 371.

² *Jefferson v. Barkto*, *supra*.

³ *Nichols v. Webster*, 1 Chand. (Wis.) 203; *Durfee v. Grinnell*, *supra*; *McConnell v. Scott*, 67 Ill. 274.

⁴ *Kohl v. Lynn*, 34 Mich. 360; *Baxter v. Spencer*, 33 Mich. 325; *Lucking v. Wesson*, 25 Mich. 443; *Cary v. Hewitt*,

26 Mich. 228. Such, also, is doubtless the law in Oregon. *Chapman v. State*, 5 Ore. 432.

⁵ *Case Threshing Machine Co. v. Campbell*, 14 Ore. 460; 13 Pac. Rep. 324, 327. Thayer, J., criticises some earlier cases in Oregon as too strongly asserting that a chattel mortgage passes no title.

⁶ *Nichols v. Webster*, *supra*.

is possession wrongful.¹ He may keep the goods, and if he has other security for the debt, such, for instance, as a mortgage upon real estate, he will be required to account for their value.² If he sell a portion of the mortgaged property, and the mortgagor is entitled to redeem, the latter may require him to account for the value of the property.³

The mortgagee's possession after default does not become wrongful through his failure to sell the property.⁴ If the mortgagor wants the property he must redeem.

A mortgagee cannot be charged as for a wrongful conversion of the mortgaged property upon taking possession after default, although on taking possession he made no claim to the property under the mortgage, but said that he took possession to prevent the owner from running off with it, and although the sale subsequently made was not in accordance with the terms of the mortgage deed.⁵

703. When the mortgagee's title becomes absolute.—If the mortgage secures a debt already due, and specifies no time of payment, it is payable immediately, and the mortgagee becomes the absolute owner from the moment of a demand and refusal or neglect of payment. The mortgagor has then merely an equitable right to pay off the mortgage, and his possession is that of a bailee.⁶

Under a provision that the mortgagee may take possession of the property and sell it at public or private sale whenever he shall deem himself unsafe, it seems that the mortgage debt is regarded as becoming due upon his taking possession for this reason, and that he thereupon acquires an absolute title to the property, subject only to the mortgagor's right to redeem in equity.⁷

In a mortgage given to secure two promissory notes, one past due and the other not due, a condition that if the mortgagor could pay "according to the terms of the notes" whenever payment should be demanded, the mortgage should be void, but if default should be made in the payment "at the time limited"

¹ *Bradley v. Redmond*, 42 Iowa, 452.

² *Craig v. Tappin*, 2 Sandf. (N. Y.) Ch.

³ *Craft v. Bullard*, Sm. & M. (Miss.) h. 366.

⁴ *Bradley v. Redmond*, *supra*.

⁵ *Murray v. Erskine*, 109 Mass. 597.

⁶ *Baltes v. Ripp*, 1 Abb. App. Dec. (N. Y.) 78.

⁷ *Huggans v. Fryer*, 1 Lans. (N. Y.) 276. See *Lyman v. Bowe*, 12 Daly (N. Y.), 281.

the mortgagee might take possession, was construed to have contemplated an extension of credit, so that the mortgagee was not entitled to possession until the maturity of both notes, and could not until that time maintain replevin for the property.¹

704. The time of payment may be extended by parol agreement, so that the condition will be saved, and the title will not become absolute in the mortgagee until the expiration of the extended time, although the mortgage be under seal.² When the time of payment has been so extended, the mortgagee is not justified in seizing the property without cause before the day designated for payment arrives.³

But parol evidence of an agreement that a mortgage specifying no time of payment should not be immediately payable is not admissible.⁴

A promise by a mortgagee, to give further time, in order to be effectual, must be either a promise made for a consideration so that it is a binding contract, or it must be such a promise as the mortgagor might properly rely upon, and would make a sale by the mortgagee within the extended time wrongful. A bill of sale, by which goods were assigned as security for a loan, contained a proviso for redemption on payment by weekly instalments, and gave the grantee power to seize the goods at any time, and to sell them on default in payment of any instalment. Just before one of the instalments became due, the grantor asked for time, and the grantee said he "would not look for a week." Within that time, however, he seized and sold the goods. The Court of Appeal of England held there was no evidence of a wrongful seizure, nor of waiver of the right of seizure and sale.⁵

¹ *Carpenter v. Town, Hill & Den.* Supp. (N. Y.) 72.

² *Flanders v. Barstow*, 18 Me. 357.

See, however, *Bowens v. Benson*, 57 Mo. 26, that the debt may be extended without affecting mortgagee's right of possession.

³ *Baxter v. Spencer*, 33 Mich. 325.

⁴ *Baltes v. Ripp*, 1 Abb. App. Dec. (N. Y.) 78.

⁵ *Williams v. Stern*, 42 Law Times Rep. N. S. 719; *S. C.* 5 Q. B. D. 409. *Bramwell, L. J.*, as reported in the first named

report, said: "It has been urged that there was something to prevent the defendant from selling, but what he said to the plaintiff was not a binding undertaking on his part not to sell; it only means this: My present intention is not to take any steps for a week. Such an expression ought not to mislead a man; and the reasonableness of this view is shown from this, that on the construction contended for, the defendant could not sell when a distress was on the point of being put in, or when there was a threat of dis-

705. Upon default the mortgagee is entitled to take peaceable possession.¹ But the law will not allow him to commit, or to threaten, a breach of the peace, and then to justify his conduct by a trial of the right of property. Instead of using force, the mortgagee must resort to his legal remedies. The mortgagee becomes a trespasser by going upon the premises of the mortgagor, accompanied by a deputy sheriff who has no legal process, but claims to act *colore officii*, and taking possession without the active resistance of the mortgagor. To obtain possession under such a show and pretence of authority is to trifle with the obedience of citizens to the law and its officers.² But if the mortgagee is accompanied by an officer who has no legal process and uses no force or threats in taking possession, and does nothing *colore officii*, the mortgagee does not become liable in trespass to the mortgagor.³

A stipulation authorizing the mortgagee to enter the mortgagor's premises and take the mortgaged property, confers no right to enter and to dispossess the mortgagor by force and violence, when the mortgagee knows that the validity of the mortgage is denied by the mortgagor.⁴

A provision in the mortgage authorizing the mortgagee upon default to take possession of the mortgaged property "as his own property, and without any process of law," confers no authority upon him, or upon an officer acting for him, to take it otherwise than peaceably.⁵

The remedy of a mortgagee for a conversion of the mortgaged property is at law and not in equity. A trustee or *cestui que trust* in a deed of trust of personal property cannot maintain a

trespass. As to the case of *Albert v. Grosvenor Investment Co.* L. R. 3 Q. B. 123, with all deference I cannot accede to it; I have the greatest doubt as to the correctness of the decision. No doubt in that case there was a difference in the terms of the bill of sale, because the right to seize accrued only on default; but I think that makes no difference in principle. In the present case I think there was a default which justified the defendant in acting as he did."

¹ § 426; *Burns v. Campbell*, 71 Ala. 271; *Dreyfus v. Cagle*, 62 Miss. 733.

The mortgagee's right of possession

after default, whether his mortgage be valid or not, can be challenged by the mortgagor or his creditors only in some mode known to the law. This cannot be done by an officer under a void execution against the mortgagor. *Cummins v. Holmes*, 109 Ill. 15.

² *Thornton v. Cochran*, 51 Ala. 415; *Street v. Sinclair*, 71 Ala. 110; 16 Cent. L. J. 53.

³ *Holloway v. Arnold* (Ala.), 5 S. W. Rep. 277.

⁴ *State v. Boynton* (Iowa), 38 N. W. Rep. 505.

⁵ *McClure v. Hill*, 36 Ark. 268.

suit in equity against a purchaser of the property, under execution issued against the grantor, to recover the property, for there is no obstacle in the way of proceeding at law.¹

The mortgagee's lien is upon the property, and he may follow this in the hands of any person to whom the mortgagor may have transferred it. But if the mortgagor has sold the property without the mortgagee's consent, and the purchaser has by his direction paid the proceeds to a creditor, the mortgagee cannot follow the proceeds. He can only follow the property.²

706. After forfeiture a mortgagee, being entitled to possession, may maintain replevin or detinue for the mortgaged property against one who has tortiously taken it from the mortgagor,³ or against a creditor who has levied upon it.⁴ He may also bring replevin or detinue for the goods against the mortgagor himself.⁵ He may maintain this action, provided any portion of the indebtedness secured by the mortgage is still due and owing to him; and it is no defence to the action to show that a portion of the indebtedness has been paid either before or after the bringing of the suit;⁶ but proof that the entire indebtedness has been discharged is such a defence.⁷ He may maintain the action after he has advertised and sold the property under a power in the mortgage; for he is entitled to possession so that he may deliver the property to the purchaser.⁸ A mortgagee, after condition broken, having an adequate remedy for the recovery of possession

¹ Sheppards v. Turpin, 3 Gratt. (Va.) 373.

² Waters v. Cass Co. Bank, 65 Iowa, 234. See Hopkins v. Hastings, 21 Mo. App. 263.

³ Fuller v. Acker, 1 Hill (N. Y.), 473; Welch v. Sackett, 12 Wis. 243; Hopkins v. Thompson, 2 Port. (Ala.) 433; Calkins v. Clement, 54 Vt. 635. In connection with the latter case, see same, cited in § 753.

⁴ Spriggs v. Camp, 2 Speers (S. C.), 181; Stringer v. Davis, 35 Cal. 25; Swift v. Hart, 12 Barb. (N. Y.) 530; Frisbee v. Langworthy, 11 Wis. 375; Kelly v. Purcell (Ohio, 1880), 8 Am. L. Rec. 705; Nelson v. Wheelock, 46 Ill. 25; Mobley v. Letts, 61 Ind. 11; Hendrickson v. Walker,

32 Mich. 68; Macomber v. Saxton, 28 Mich. 516; Cary v. Hewitt, 26 Mich. 228; Wood v. Weimar, 104 U. S. 786.

⁵ Mervine v. White, 50 Ala. 388; Morrison v. Judge, 14 Ala. 182; Brookover v. Esterly, 12 Kans. 149; Brown v. Phillips, 3 Bush (Ky.), 656; Bates v. Wilbur, 10 Wis. 415.

⁶ Machette v. Wanless, 1 Colo. 225; Morrison v. Judge, 14 Ala. 182; and see Bell v. Pharr, 7 Ala. 807.

⁷ Bellamy v. Doud, 11 Iowa, 285. The mortgagee's production of the note and mortgage *prima facie* shows his right to the possession. Fikes v. Manchester, 43 Ill. 379.

⁸ Lacey v. Gibony, 36 Mo. 320.

by replevin, is not entitled to an injunction restraining the mortgagor from disposing of the property.¹

Under the system of administering law and equity in New York and other states which have abolished the distinction between law and equity, or admit equitable defences in suits at law, a mortgagor of personal property, or any one standing in his place, can, when sued for the mortgaged property, claim the right to redeem, in his defence to that suit; and where he has not been foreclosed, he may mitigate the recovery against himself by reducing the judgment to the amount actually due on the mortgage.²

The fact that the mortgaged chattels are exempt from attachment is no defence to an action by the mortgagee for their recovery from the mortgagor's widow, to whom they had been set off by order of the proper court. But in such case the widow might redeem the property by paying the debt, or she might probably obtain an order for the sale of the property and the payment to her of the proceeds in excess of the mortgage debt.³

707. A mortgagee may sell the property after forfeiture and possession taken without any formal foreclosure. Inasmuch as the mortgagee's title becomes absolute upon forfeiture, he may sell the property at private sale and confer upon the purchaser a good title to it, although the mortgage contain provisions for the selling of the property at auction, and the payment of the surplus to the mortgagor.⁴ More than this, the mortgagee may, in the absence of any statutory requirement upon the subject, cut off the right of redemption by a sale of the property, upon reasonable notice to the mortgagor; just as a pledgee may sell property held in pledge upon giving reasonable notice to the mortgagee;⁵ and it is even declared that the mortgagee after default

¹ *Minnesota Linseed Oil Co. v. Maginis*, 32 Minn. 193.

² *Hinman v. Judson*, 13 Barb. (N. Y.) 629.

³ *Recker v. Kilgore*, 62 Ind. 10.

⁴ *Flanders v. Chamberlain*, 24 Mich. 305; *Dane v. Mallory*, 16 Barb. (N. Y.) 46; *Talman v. Smith*, 39 Ib. 390; *Robinson v. Campbell*, 8 Mo. 365; *S. C. Ib.* 615; *Freeman v. Freeman*, 17 N. J. Eq.

44; *Lee v. Fox*, 113 Ind. 98. See §§ 773-775, 793.

⁵ **New York:** *Patchin v. Pierce*, 12 Wend. 61, 63; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100; *Charter v. Stevens*, 3 Den. 33; *Stoddard v. Denison*, 38 How. Pr. 296; *S. C.* 7 Abb. Pr. N. S. 309; *Craig v. Tappin*, 2 Sandf. Ch. 78, 90; *Hall v. Ditson*, 55 How. Pr. 19; *Chamberlain v. Martin*, 43 Barb. 607; *Ballou v. Cunningham*, 60

may effectually foreclose the mortgagor's right to redeem by a private sale, without notice to the mortgagor.¹ But this statement of the law is correct for only a very few states, except in cases in which the mortgage itself provides for such a sale. In Michigan, however, it was declared that the main difference between the foreclosure of a mortgage of real estate and a foreclosure of a chattel mortgage is, that, while the former must be effected by decree in a bill in equity, or by sale in a mode prescribed by statute or provided for in the mortgage itself, a chattel mortgage may be foreclosed without suit, provided the mortgage contains no provision as to notice or the mode of sale; it may be foreclosed by the mortgagee's own act by selling after due notice.² But if the mortgage contains a power of sale which specially provides how and upon what notice the mortgagee may sell, such express provision precludes any implication upon the subject, and the mortgagee cannot cut off the equitable right to redeem, if this be asserted in a reasonable time, by a sale in any other mode.

The Supreme Court of Nevada in a recent case declared that the entire current of authorities supports the proposition that the mortgagee may sell either at public or private sale.³

Ib. 425; *Huggans v. Fryer*, 1 Lans. 276; *Hulsen v. Walter*, 34 How. Pr. 385; *Talman v. Smith*, 39 Barb. 390. **New Jersey**: *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93; *Hall v. Bellows*, 11 N. J. Eq. 333; *Chapman v. Hunt*, 13 N. J. Eq. 370; *Runyon v. Groshon*, 12 N. J. Eq. 86; *Bird v. Davis*, 14 N. J. Eq. 467. **Kansas**: *Denny v. Faulkner*, 22 Kans. 89, 100. **South Carolina**: *Johnson v. Vernon*, 1 Bailey, 527; *Bryan v. Robert*, 1 Strobb. Eq. 334. **Nevada**: *Bryant v. Carson River Lumbering Co.* 3 Nev. 313. **Indiana**: *Broadhead v. McKay*, 46 Ind. 595. **Wisconsin**: *First Nat Bank v. Damm*, 63 Wis. 249. **California**: *Wilson v. Brannan*, 27 Cal. 258. In the latter case the court say: "The mortgagee has two remedies, either of which he may pursue at his election. He may resort to a court of equity to compel a redemption or to foreclose the mortgagor's right to redeem, or he may obtain the same object by a fair public sale of the property after due notice to the mortgagor. Whether the iron and

bonds delivered be regarded as a pledge or mortgage can make no practical difference, as in either case the mode of subjecting the security to sale for the payment of the debt may be the same, and hence we have made no reference to the distinction to be found in the books between a pledge and mortgage, and we deem it unnecessary in disposing of the case before us to do so."

¹ **New York**: *Chamberlain v. Martin*, 43 Barb. 607; *Patchin v. Pierce*, 12 Wend. 61, per Nelson, J.; *Hall v. Ditson*, 55 How. Pr. 19; *S. C. 5 Abb. N. C. 198*.

² *Flanders v. Chamberlain*, 24 Mich. 305, 314, per Christy, J.

³ *Bryant v. Carson River Lumbering Co. supra*. "Indeed, the law authorizing the mortgagee to sell is, in our opinion, so thoroughly settled that it cannot now admit of a question. Such being the right of the mortgagee, it follows as a necessary consequence, that the purchaser from him obtains an absolute legal title as complete, perfect, and inde-

708. What is a reasonable notice to the mortgagor of the time and place of a sale made by virtue of the mortgagee's title, without judicial procedure or special power, must be determined from all the circumstances of each particular case, and he who alleges the insufficiency of such a notice must assign some reason for his allegation.¹

The creditor will be held, at his peril, to deal fairly and justly with the property, both as to the time of the notice and the manner of the sale. Although it appears that he took pains to secure the best price practicable for the goods, and that they were sold for their value, and that the mortgagor assented to the prices obtained, yet if he can prove that they were sold unfairly or at an under price, he will be permitted to do so, and will be allowed their full value.²

709. A sale of the property by the mortgagee after forfeiture, with the mortgagor's consent, is equivalent to a formal foreclosure of the equity of redemption. Such sale may be made without giving public notice of it.³ The title of the purchaser in such case can be assailed neither by the mortgagor nor by his creditors, unless they had a lien upon the mortgaged property at the time of the purchase.⁴ Even subsequent mortgagees are in no condition to question the title of one who has purchased the mortgaged property of the mortgagor and mortgagee. All they can require of the prior mortgagee is a foreclosure of his mortgage in such a way as to protect their claim upon the interest of the mortgagor; and if he sells the property for its full value, and credits such value upon his mortgage, the subsequent mortgagees must treat this as a complete extinguishment of the title of the mortgagor, and of all persons claiming under him, as fully as if the mortgage had been foreclosed by the statutory method.⁵

A sheriff, by virtue of an execution against the mortgagor, having advertised the property for sale upon a certain day, the mort-

feasible as can exist or be acquired by purchase; and a sale upon due notice to the mortgagor, whether at public or private sale, forecloses all equity of redemption as completely as a decree of court."

¹ *Wilson v. Brannan*, 27 Cal. 258.

² *Bird v. Davis*, 14 N. J. Eq. 467.

³ *Harris v. Lynn*, 25 Kans. 281; *Campbell v. Woodstock Iron Co.* (Ala.) 3 So. Rep. 369.

⁴ *Talman v. Smith*, 39 Barb. (N. Y.) 390.

⁵ *Faeth v. Leary* (Neb.), 36 N. W. Rep. 513.

gatee directed him to sell the property under the mortgage at the same time, and he sold it free of incumbrance, without giving further notice of such sale, and applied the proceeds to the satisfaction both of the execution and the mortgage debt. The mortgagor had notice of the mortgagee's intention to have the property thus sold, and was present at the sale, and afterwards inquired whether there was any balance after paying the mortgage debt, and said if there was that he wanted it. It was held that his conduct in not making objection amounted to an acquiescence in, or assent to, the payment of the mortgage debt out of the proceeds of the sale, and that he was estopped from calling it in question.¹

710. A sale of chattels by a mortgagee without foreclosure proceedings is always attended with some difficulty and embarrassment. The conduct and fairness of the sale, and the rights acquired under it, are always open to investigation at the instance of the mortgagor.² A sale under judicial sanction is therefore safer; and there are many good reasons why one holding a mortgage for a large amount should not incur the risk of selling it without a decree of court. Such a decree will always remain a record for his protection; it settles all equities between the parties. If he undertakes to enforce the mortgage, and raise the money without such decree, he is liable to be called upon at any time to account for the execution of his trust. Where the property is out of the possession of the mortgagee there seems a necessity for his coming to a court of equity; otherwise he must first resort to his action at law to recover possession of the property.³

If the property is subject to the liens of other creditors, the mortgagee should sell only enough to satisfy his mortgage claim. For any surplus he must account to such other creditors. He must, moreover, account for the actual value of the goods, without regard to the amount received for them, if that be less than their value.⁴

711. Recovery of a deficiency. — Another reason for fore-

¹ *McConnell v. People*, 71 Ill. 481.

⁴ *Lininger v. Herron* (Neb.), 36 N. W.

² *Freeman v. Freeman*, 17 N. J. Eq. 44, 47.

Rep. 481. And see *Faeth v. Leary* (Neb.), 36 N. W. Rep. 513.

³ *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93.

closing in equity is that the mortgagee may thus in the same suit have a decree for any deficiency there may be. Indeed, Chancellor Harper, of South Carolina, said: "The ground on which equity entertains such a bill is, that the property may be sold under the direction of the court; that if it falls short of satisfying the debt, the mortgagee may have a decree for the residue; or, if there should be a surplus, that it may be awarded to the mortgagor, and so put an end to litigation. If the mortgagee himself should sell, there would be, in case of deficiency, an action at law to recover the remainder of the debt; or, if there should be a surplus, the mortgagor might sue for it. Equity makes an end of these matters."¹

A mortgagee, in order to secure a claim for any deficiency that may arise against the mortgagor, must foreclose his mortgage in equity, or in a manner provided by statute. By selling in any other mode he waives all claim for a deficiency.²

If a mortgagee takes possession of the mortgaged property after default, and retains it or sells it without foreclosure, the mortgage debt is regarded as satisfied.³ If the same debt be secured by a mortgage of land as well as by a mortgage of chattels, and the mortgagee seizes the latter upon default, a subsequent purchaser of the land from the mortgagor has an equity to compel the mortgagee to apply the value of the chattels seized to the mortgage debt. The mortgagee in such case must account for the value of the chattels, although they be lost or destroyed after such seizure. A mortgagee of slaves under such circumstances was held liable to account for their value, where after such seizure he allowed them to go into the possession of the mortgagor on a forthcoming bond, where they remained uncalled for until they were lost under the general emancipation act. The slaves were in the legal possession of the mortgagee, the mortgagor holding them as his bailee.⁴

¹ *Bryan v. Robert*, 1 Strobb. (S. C.) Eq. 334, 342. And see *Lee v. Fox*, 113 Ind. 98; 14 N. E. Rep. 889.

² § 773; *Porter v. Parmly*, 34 N. Y. Superior Ct. 398; *S. C.* 43 How. Pr. 445, per Freedman, J.; *Olcott v. Railroad Co.*, 40 Barb. (N. Y.) 179. *In re Haake*, 2

Sawyer, 231; *Lee v. Fox*, *supra*.

³ *Hazard v. Robinson*, 15 R. I. 226; *Clarke v. Robinson*, 15 R. I. 231. Recovery of a judgment for the whole amount of the mortgage debt opens such a foreclosure: § 693.

⁴ *Moody v. Haselden*, 1 S. C. 129.

712. The mortgagor is entitled to any surplus that may arise from such a sale. When a mortgagee rightfully recovers possession of the mortgaged property, and disposes of it upon due notice within a reasonable time and for a fair and reasonable price, he is chargeable with no greater amount than that for which the property sold.¹ He is liable, however, to refund any excess he may receive over the amount of the mortgage debt.² But the mortgagor cannot recover such surplus in an action for money had and received.³ His proceeding for this purpose should be by bill in equity in the nature of a bill to redeem. When a court of equity has established the right to redeem, but the mortgagee has consumed or disposed of the property, so that it cannot be redeemed in kind, it may enter a personal decree against the mortgagee for the excess of the value of the property over the amount found due on the mortgage.⁴

The mortgagor is entitled to credit only for the net proceeds of the sale made by the mortgagee, after deducting the expenses of seizure and sale.⁵

After a seizure and sale by the mortgagee after default in payment of the mortgage debt, the only right which the mortgagor has is to require an account from the mortgagee of the proceeds of sale, and the mortgagee is entitled to credit for the mortgage debt and expenses, and also for any unsecured claim held by him against the mortgagor.⁶

¹ *Armstrong v. McAlpin*, 18 Ohio St. 184.

² *Pratt v. Stiles*, 17 How. (N. Y.) Pr. 211; *S. C.* 9 Abb. Pr. 150; *Flanders v. Chamberlain*, 24 Mich. 305, 314; *Denny v. Faulkner*, 22 Kans. 89. And see *Ashworth v. Dark*, 20 Tex. 825.

³ *Flanders v. Barstow*, 18 Me. 357.

⁴ *Flanders v. Chamberlain supra*.

⁵ *Straub v. Screven*, 19 S. C. 445.

⁶ *Reese v. Lyon*, 20 S. C. 17; *McClen-don v. Wells*, 20 S. C. 514. The rule is different in an action brought by the mortgagee to foreclose the mortgage. There the action being based upon the contract to pay the mortgage debt, the mortgagee is entitled to recover no more than the amount secured by such contract. *Reese v. Lyon, supra*.

CHAPTER XVII.

STATUTORY PROVISIONS RELATING TO FORECLOSURE AND REDEMPTION: 713-757.

713. **In general.** — In nearly all the states and territories there are statutory provisions specially applicable to the foreclosure of mortgages of personal property. In a few states the same statute applies to the foreclosure of mortgages of both real and personal property; and in a few states there are no statutory provisions relating to the foreclosure of chattel mortgages, but the holders of these securities are left to seek their remedy either under the general jurisdiction of courts of equity, or to take the remedy into their own hands by selling the property at public sale, in very much the same way that a pledgee may upon default sell property which he holds in pledge.

It is to be observed, however, that in nearly all the states chattel mortgages usually contain a power authorizing the mortgagee to sell the property upon default, after giving such notice as the mortgage itself may provide for; or else trust deeds with a similar power in a trustee are used instead of such mortgages. In many states, mortgages with a power of sale, or trust deeds, are used to the exclusion of all other forms. For this reason, the cases which have arisen under equitable actions for the foreclosure of chattel mortgages, or under statutory forms of procedure for this purpose, are not very numerous.

The statutory methods of foreclosing chattel mortgages are quite unlike in the various states. They agree in hardly anything except in providing for a sale of the mortgaged property after notice, and for the payment of any surplus there may be after satisfying the mortgage debt to the mortgagor.

Statutory provisions relating to the foreclosure of chattel mortgages do not prevent the parties from inserting in the mortgage a power of sale, under which the property may be legally disposed of in a manner different from that provided for by statute, unless

the statutory method be expressly made exclusive of any other method.¹

Very little provision is made by statute for the redemption of chattel mortgages. Redemption is commonly left to the general equity jurisdiction of the courts. It correlates foreclosure. The former exists until the latter is complete.

714. Alabama.²—Foreclosure is by a bill in equity. Execution may issue for the balance found due after a sale of the property ordered.

715. Arizona Territory.³—All mortgages of real or personal property or both, with powers of sale in the mortgage, and all deeds of trust in the nature of mortgages, may, at the option of the mortgagees or *cestuis que trust*, as the case may be, their executors, administrators, or assigns, be foreclosed by them in the proper courts, and the property sold, in the same manner in all respects as in case of ordinary mortgages.

All sales of property made by the mortgagee or his legal representatives, by virtue of a mortgage with a power of sale, or by the trustee named in a trust deed, in pursuance of the provisions of such mortgage or trust deed, shall be valid and binding on the mortgagors and grantors in such trust deed, and all persons claiming under them, and shall foreclose all right and equity of redemption of the property so sold.

716. Arkansas.⁴—Mortgages are foreclosed by a complaint in the nature of a proceeding in equity. It is not necessary to enter an interlocutory judgment, or give time for the payment of money, or for doing any other act; but final judgment may be given in the first instance. In the foreclosure of a mortgage, a sale of the mortgaged property shall in all cases be ordered. In an action on a mortgage or lien, the judgment may be rendered for the sale of the property, and for the recovery of the debt against the defendant personally.⁵

¹ §§ 778, 789; *Denny v. Van Dusen*, 27 Kans. 437.

As to the effect of the statutory provisions in Vermont, see § 753.

² Code 1886, § 3605.

³ R. S. 1887, §§ 2358, 2359.

⁴ Dig. of Stat. 1884, §§ 5168-5172.

⁵ See *Price v. State Bank*, 14 Ark. 50.

Sales of personal property made by order of court are required to be on a credit of three months. In all sales on credit, the purchaser must execute a bond, with good security, to be approved by the person making the sale, which bond shall have the force of a judgment. If the whole of the mortgaged property does not sell for a sum sufficient to satisfy the amount due, an execution may be issued against the defendant, as on ordinary judgments.

At all sales of personal or real property under mortgages and deeds of trust in this state, such property shall not sell for less than two thirds of the appraised value thereof.¹ This provision does not apply to sales of property for the purchase money thereof. If the property shall not sell at the first offering for two thirds of the amount of the appraisement, then, in case of personal property, another offering may be made sixty days thereafter; and in case of real property, another offering may be made twelve months thereafter; at which offerings the sale shall be to the highest bidder, without reference to the appraisement. When such sales are to be made, the mortgagee, trustee, or other person authorized to make the same, shall, before the day fixed therefor, apply to the nearest justice of the peace of the township in which such sale is made, or, if there be no justice in said township, then to the nearest justice of an adjoining township, for the appointment of appraisers; and such justice shall thereupon appoint three disinterested householders of the county, who shall take and subscribe an oath before such justice that they will well and truly view and appraise the property that may be shown them, and such appraisers shall proceed to view and appraise such property, and they, or any two of them, shall make a report of their appraisement in writing, which report shall be attached to the oaths taken as aforesaid, and shall be delivered to the person making the sale, and held by him subject to inspection by all parties interested. For their services the appraisers shall receive one dollar each, to be paid from the proceeds of the sale of the property.

717. California.²— A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of

¹ Acts 1879, p. 94, §§ 1, 2; Dig. of Stats. 1884, §§ 4759, 4760.

² Codes and Stats. §§ 7933, 7967, 8000-8011.

the property, made in the manner and upon the notice prescribed for the foreclosure of a pledge, which is as follows : —

When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him by a sale of property pledged. Before the property can be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor. He must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend. Notice of sale may be waived at any time, but is not waived by a mere waiver of demand of performance. A debtor or pledgor waives a demand of performance as a condition precedent to a sale of the property pledged by a positive refusal to perform, after performance is due, but cannot waive it in any other manner except by contract.

The sale by a pledgee must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property ; and must be for the highest obtainable price. A pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states, or corporations ; but he may collect the same when due. Whenever the property can be sold for a price sufficient to satisfy the claim of the pledgee, the pledgor may require it to be sold, and its proceeds applied to such satisfaction when due. After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of the sale and collection, and must pay the surplus to the pledgor on demand. When property pledged is sold before the claim of the pledgee is due, he may retain out of the proceeds all that can possibly become due under his claim, until it becomes due, with the proper rebate of interest. A pledgee or pledge-holder cannot purchase the property pledged, except by direct dealing with the pledgor.

Instead of selling property pledged in the manner provided, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court ; and in that case may be authorized by the court to purchase at the sale.

A power of sale may be conferred by a mortgage upon the

mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security.

A personal mortgage may also be foreclosed by proceedings under the Code of Civil Procedure,¹ which provides that there shall be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal estate. In such action the court may by its judgment direct a sale of the incumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs and expenses of sale and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases on which execution may be issued. Subsequent parties in interest not appearing of record need not be made parties to the action; and judgment is conclusive against them. Any surplus there may be the court may cause to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court. When the debt is not all due, so soon as sufficient property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due for principal or interest, the court may on motion order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

718. Colorado.² — There shall be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property. In actions for the foreclosure of mortgages, the court shall have the power, by its judgment, to direct a sale of the incumbered property, or as much as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and expenses of the sale, and the amount due to the plaintiff; and if it appears from

¹ §§ 726-728, being §§ 10726-10728 of Code 1887, §§ 252-254; Laws 1887, p. 172.
Codes and Stats.

² Civil Code 1877, §§ 229-231; Civil

the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment shall be docketed for such balance against the defendant or defendants personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued. No person holding a conveyance from or under the mortgagor, or of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear on record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment therein rendered and the proceedings therein had shall be as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to said action, and shall in all respects have the same force and effect. If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court. If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

719. Connecticut.¹—When personal property is mortgaged, together with the real estate, the mortgage may be foreclosed as if wholly of real estate; but when personal property is mortgaged without the real estate, the mortgagee, upon breach of the condition of the mortgage, may bring a complaint claiming the sale of the mortgaged property; and upon said complaint the court may order the same, or so much thereof as may be necessary to satisfy such debt and the costs of the prosecution, unless such debt and costs shall be paid within such time as it shall limit, to be sold free of all subsequent incumbrances, by some proper officer, in such manner and with such notice as said court shall direct; and after satisfying said debt and costs out of the avails of such sale,

¹ G. S. 1888, §§ 3016, 3017.

the excess, if any, shall be paid by said officer to the parties entitled thereto.

No such mortgage shall be held invalid, as to any item of personal property included therein, by reason of its being described as consisting of less than its true number or quality; but if foreclosed, the court may make a just order of division in its final decree.

720. Dakota Territory.¹—A mortgagee of personal property, when the debt to secure which the mortgage was executed becomes due, may foreclose the mortgagor's right of redemption by a sale of the property, made in the manner and upon the notice prescribed for enforcing a pledge, or by proceedings under the Code of Civil Procedure.²

When performance of the act for which a pledge is given is due, in whole or in part, the pledgee may collect what is due to him, by a sale of property pledged, subject to the rules and exceptions hereinafter prescribed. Before property pledged can be sold, and after performance of the act for which it is security is due, the pledgee must demand performance thereof from the debtor, if the debtor can be found. A pledgee must give actual notice to the pledgor of the time and place at which the property pledged will be sold, at such a reasonable time before the sale as will enable the pledgor to attend. Notice of sale may be waived by a pledgor at any time, but is not waived by a mere waiver of demand of performance. A debtor or pledgor waives a demand of performance as a condition precedent to a sale of the property pledged by a positive refusal to perform, after performance is due, but cannot waive it in any other manner except by contract. The sale by a pledgee of property pledged must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property; and must be for the highest attainable price. A pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states, or corporations; but he may collect the same when due. Whenever property pledged can be sold for a price sufficient to satisfy the claim of the pledgee,

¹ Rev. Codes 1877, p. 463; § 1743 of Civil Code. foreclosure in the latter method, see 2 Jones on Mortgages, § 1327.

² For provisions for proceedings for

the pledgor may require it to be sold, and its proceeds to be applied to such satisfaction, when due. After a pledgee has lawfully sold property pledged, or otherwise collected its proceeds, he may deduct therefrom the amount due under the principal obligation, and the necessary expenses of sale and collection, and must pay the surplus to the pledgor on demand. When property pledged is sold by order of the pledgor before the claim of the pledgee is due, the latter may retain out of the proceeds all that can possibly become due under his claim until it becomes due. A pledgee or pledge-holder cannot purchase the property pledged, except by direct dealing with the pledgor.¹

Instead of selling property pledged as hereinbefore provided, a pledgee may foreclose the right of redemption by a judicial sale under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale.

The sale of any property on which there is a lien, in satisfaction of the claim secured, or, in case of personal property, its wrongful conversion by the person holding the lien, extinguishes such lien.²

A chattel mortgage, when the conditions of the same have been broken, may be foreclosed by a sale of the property mortgaged, upon the notice and in the manner following: The notice shall contain the names of the mortgagor and the mortgagee, and the assignor, if any; the date of the mortgage; the nature of the default, and the amount claimed to be due thereon at the date of the notice; a description of the mortgaged property, conforming substantially to that contained in the mortgage; the time and place of sale; the name of the party, agent, or attorney foreclosing such mortgage.

Such notice shall be posted in five public places in the county where the property is sold, at least ten days before the time therein specified for such sale. The mortgagee, his assigns, or any other person may in good faith become a purchaser of the property sold. Such attorney fee as shall be specified in the mort-

¹ R. C. 1883; §§ 1771-1782 of Civil Code.

² R. C. 1883; § 1718 of Civil Code.

Consequently, a mortgagee who takes possession of the chattels mortgaged and sells them at private instead of public sale, as the statute requires, loses his lien. The mortgagee's wrongful conversion of

the property is held to work a forfeiture of his lien; but the mortgage debt is not thereby extinguished or released. Such sale is treated just as a wrongful or unauthorized sale of a pledge by the pledgee is treated. *Everett v. Buchanan*, 2 Dak. 249; 6 N. W. Rep. 439.

gage may be taxed and made a part of the costs of foreclosure: provided such mortgage is foreclosed by an attorney of record of this territory, and the name of such attorney appears as attorney on the notice of sale, and in no other cases shall an attorney fee be allowed. This act shall not be construed to affect the provisions relating to foreclosures of chattel mortgages by action.¹

721. Delaware.²—If default, for the space of sixty days, be made in the payment of a mortgage of personal property, or of an instalment thereof (if it be payable by instalments), the mortgagee shall have the right to proceed at law for the enforcement of his lien and the collection of the mortgage money by the same process and means as are used in the case of mortgages of real estate, and judgment may be obtained as well for default of appearance or want of affidavit of defence as upon trial. The proceeds of the sale shall be paid on the liens upon the property in the order of their priority, and any surplus to the mortgagor, or his executors, administrators, or assigns.

722. Florida.³—Foreclosure may be had by petition in the circuit court of the county in which the mortgaged premises are situated. This is a court of common law, but there is also jurisdiction of the subject in chancery, and the more general practice is said to be to proceed by bill in equity; but inasmuch as the statutory provisions for foreclosing by petition allow a personal judgment for any balance of the mortgage debt remaining unsatisfied after a sale of the premises, this has been declared to be the more convenient method.⁴ The statutory process of foreclosure in a court of common law is not distinctively a common law action; it is in fact conducted according to equitable principles. Like a bill in equity, it sets forth the parties to the mortgage and the petitioner's title, and describes the premises and the debt secured.

The object of the statute allowing foreclosure by petition was to prevent the necessity of two suits: one in equity to foreclose, and a suit at law on the bond or note. The proceedings are *in rem* as to the foreclosure, and *in personam* as to the judgment for

¹ Laws 1885, p. 50.

² Laws 1877, ch. 477, § 2.

³ Bush's Dig. of Stat. pp. 606, 607;

Laws 1874, p. 75; Dig. Laws 1881, pp. 766-768, ch. 153, §§ 5-12.

⁴ Judge v. Forsyth, 11 Fla. 257.

the debt or demand. In order to use this process there must be property upon which the decree of foreclosure can act.

Before this statute the mortgagee had his option to proceed in equity against the property, or at law on his bond or note; and he may now as formerly pursue either remedy or both at the same time, but not in the same forum or in the same suit. This can only be accomplished by means of the statute.¹

The petition, with the original mortgage, must be filed in the office of the clerk of the court at least two months before the term of the court at which judgment can be demanded. Upon the petition and mortgage, and exhibition to the court of any bond, note, or other evidence of the debt secured, with an affidavit of the petitioner, or of his agent or attorney, of the amount of the principal and interest claimed to be due, the court shall at the first term after the filing of such petition, unless good cause be shown to the contrary, give judgment for such debt and interest, with costs and charges of the proceedings, and shall also by its judgment forever foreclose and debar the mortgagor, and all persons claiming under him, of all right and equity of redemption. The original mortgage, or a copy of it duly certified, must form a part of every petition or bill of complaint for foreclosure.² Personal service of notice of the intention of the party to institute the suit must be served upon the mortgagor or other person having the equity of redemption, by an officer appointed to serve writs, four months before the term of court at which judgment may be rendered. If the owner of the equity of redemption reside beyond the jurisdiction of the court or out of the state, service is made by publication in a newspaper once in every two weeks for at least four months before the first day of the term.

Whenever a defendant has any objection or cause to show against the foreclosure, such objection or cause must be shown and filed by way of plea to the petition of foreclosure, fifteen days before the first day of the term next following the expiration of the aforesaid respective periods prescribed for the publication or service of the notice, of the substance of the petition; and such plea, or the matters therein contained, must be verified by the oath of the party filing it, or of some other credible person. The petitioner may take issue on the plea, reply or demur thereto.

¹ Judge v. Forsyth, 11 Fla. 257.

² Laws of Florida 1874, p. 75; Dig. Laws 1881, p. 767.

The case is decided by court and jury, or the court alone, as the case may be. The judgment of the court is entered up and filed, and execution issues thereon as in other cases.

Upon application of any person entitled to the foreclosure of a mortgage of personal property remaining in the possession of the mortgagor or mortgagors, for an attachment against the property mortgaged, it shall be the duty of the judge of the court to which application for the foreclosure of the mortgage shall be made to direct the issuing of a writ of attachment, which the clerk of the said court shall accordingly issue, directed to the ministerial or executive officer of the said court, commanding him to attach, levy upon, and take into possession and custody the said mortgaged property, or so much thereof as will be sufficient to satisfy the debt or demand of the petitioner or petitioners, and the costs and charges of the proceedings; and the said officer shall execute such writ without delay, and shall retain the said property attached in his custody and possession until the judgment of foreclosure shall be obtained, when he shall dispose of it according to law, or until the further order of the court in the premises, unless it shall be replevied in the manner hereinafter pointed out; but no such writ of attachment shall issue unless the petitioner or petitioners for foreclosure, or any of them, or his, her, or their agent or attorney, shall make oath of the sum really and truly due upon the mortgage to be foreclosed; and that he has reason to fear that the property mortgaged will be concealed, so that the ordinary process of law cannot reach it, or that it will be removed beyond the jurisdiction of the court; and shall exhibit to the judge the original mortgage, or any other evidence, and an acknowledgment of the debt or demand secured by it, which shall appear to have been given by the mortgagor or mortgagors at the time the application for such writ of attachment was made. The demand of the said attachment, if made at the time of filing the petition for foreclosure, must be contained in the said petition, but the same attachment may be applied for by petition, and obtained, on a compliance with the aforesaid requisitions, at any time before the judgment of foreclosure.¹

¹ Dig. Laws 1881, p. 119, ch. 7, §§ 38, 39. It shall be lawful for the mortgagor or mortgagors, or any other person or persons having an interest in the equity of

redemption of any personal property which may be attached under the last preceding section of this act, to replevy the same by giving bond, with at least two good and

723. Georgia.¹—Mortgages on personal property are foreclosed in the following manner, namely: Any person holding a mortgage on personal property, and wishing to foreclose the same, shall, either in person, or by his agent or attorney in fact or at law, go before some officer of this state who is authorized by law to administer oaths, or a commissioner from this state residing in some other state, and make affidavit of the amount of principal and interest due on such mortgage, which affidavit shall be annexed to such mortgage, or a copy thereof sworn to by said person, his agent or attorney in fact or at law, as being a true and correct copy of said mortgage; and when such mortgage or sworn copy thereof, with such affidavit annexed thereto, shall be filed in the office of the clerk of the superior court of the county wherein the mortgagor resides at the date of the foreclosure, if a resident of this state, or where he resided at the date of the mortgage if not a resident of this state, it shall be the duty of such clerk to issue an execution directed to all and singular the sheriffs and coroners of this state, commanding the sale of the mortgaged property to satisfy the principal and interest, together with the costs of the proceedings to foreclose the mortgage.²

sufficient securities, in a sum sufficient to cover the amount of the debt sworn to be due upon the mortgage, payable to the ministerial officer of the court to whom the writ of attachment shall have been directed and conditioned, to return to the said officer, or his successors in office, the said property, whenever the mortgage of it shall be foreclosed by the judgment of the court, or to pay such sum of money as shall, by the said judgment, be adjudged to be due to the petitioner or petitioners for foreclosure, and all the costs and charges of the proceedings, whenever the same shall be demanded; but no replevy shall be made but upon the payment of all costs of issuing the attachment, and of the proceedings consequent thereon, and the bond so given on replevy, by the provisions of this section, shall have the force and effect of a judgment; and nothing herein contained shall be so construed as to release the mortgaged property from the lien created by said mortgage.

As to the mode of foreclosing mortgages

upon personal property, when the debt secured does not exceed one hundred dollars, see Laws 1885, ch. 3586.

¹ Code 1873, and Code 1882, §§ 3971-3979; amended, Laws 1883, p. 74, No. 465.

A single mortgage securing two creditors may be foreclosed in favor of both at the same time. Such a proceeding is not the joining of separate claims in the same action. *Chamberlin v. Beck*, 68 Ga. 346.

A substantial compliance with the statute is essential. *Duke v. Culpepper*, 72 Ga. 842.

As to the jurisdiction of the county court, see *Aycock v. Subers*, 73 Ga. 807.

A mortgage made in another state may be foreclosed in any county of this state where the property may be found. *Hubbard v. Andrews*, 76 Ga. 177.

² An affidavit upon which to base the foreclosure of a chattel mortgage must allege that the defendant resides in the county of such proceeding. *Callaway v. Walls*, 54 Ga. 167; *Harper v. Grambling*,

When the execution before mentioned shall be delivered to the sheriff or coroner, as the case may be, it shall be his duty to levy on the mortgaged property wheresoever the same may be found, and after advertising the same in one or more of the public gazettes of the state, weekly, for eight weeks before the day of sale, the said sheriff or coroner shall put up and expose said property to sale at the time and place and in the same manner as govern in case of sheriffs' sales.¹

If other executions are levied on the mortgaged property, and the same is sold after an advertisement of only thirty days, the mortgage execution may nevertheless claim the proceeds of the sale if its lien is superior.

If a mortgage on personalty is not foreclosed, and the equity of redemption is levied on by other execution by consent of the mortgagor and mortgagee, and the plaintiff in the execution, the entire estate may be sold, and the mortgagee claim under his lien, in the same manner as if his mortgage was foreclosed.²

When an execution shall issue upon the foreclosure of a mortgage on personal property, as hereinbefore directed, the mortgagor or his special agent may file his affidavit of illegality to such execution, in which affidavit he may set up and avail himself of any defence which he might have set up according to law, in an ordinary suit upon the demand secured by the mortgage, and which goes to show that the amount claimed is not due.³ The judge who passed the order of foreclosure may order the levying officer to postpone the sale of the mortgaged property, upon the mortgagor, or his special agent or attorney, giving bond, with good and sufficient security, in double the amount of such execu-

66 Ga. 236. Affidavit may be made before a clerk of the superior court. *Chamberlin v. Beck*, 68 Ga. 346. See further, as to the affidavit, *Lewis v. Frost*, 69 Ga. 755; *Dawson v. Garland*, 70 Ga. 447; *Duke v. Culpepper*, 72 Ga. 842; *Lilly v. Willis*, 73 Ga. 139. See further, as to the county in which proceedings should be had, *Brown v. Greer*, 13 Ga. 285; *Griffin v. Marshall*, 45 Ga. 549. If the original mortgage has been lost or destroyed, the foreclosure may be made on a certified copy from the record of the mortgage. *Holt v. Holt*, 23 Ga. 5.

The issuing of this execution, which is a lien upon the special property, does not prevent the issuing of an execution upon the debt, which is a general lien. *Juchter v. Boehm*, 63 Ga. 71. See § 758.

¹ As to sufficiency of the execution, see *Morton v. Gahona*, 70 Ga. 569.

² Such consent need not be in writing. *Goode v. Rawlins*, 44 Ga. 593.

³ *Alston v. Wheatley*, 47 Ga. 646. See *Mell v. Moony*, 30 Ga. 413; *Miller v. Blitch*, 74 Ga. 360; *Willis v. Jefferson*, 75 Ga. 743.

tion, conditioned for the return of such property when called for by the levying officer, which bond shall be made payable to the plaintiff, who may sue and recover thereon when the condition is broken; and when such affidavit of illegality is filed, and such order of postponement is passed, and such bond has been given, the levying officer shall postpone the sale of said property, and return all the proceedings and papers to the next term of the court whose clerk issued the execution, where the questions and issues shall be tried as other cases of illegality; and the jury shall be sworn to give at least twenty-five per cent. damages to the plaintiff on the principal sum, in case it shall appear that the affidavit of illegality was filed for a delay only. If the mortgagor fails to set up and sustain his defence as hereinbefore authorized, the mortgaged property shall be sold, and the proceeds of the sale shall be applied to the payment of said mortgage execution, unless such proceeds are claimed by some other lien in the hands of the officer entitled in law to priority of payment; and if, after the satisfaction of such execution or other lien, there may be any surplus, the same shall be paid to the mortgagor or his agent.

When the holder of a mortgage on personal property is dead, the affidavit and proceedings to foreclose may be made and prosecuted by his executor or administrator; and if the mortgagor be dead, his legal representative may set up the same defence which he could do if living.

If any creditor of the mortgagor, whether his debt be in judgment or not, desires to contest the validity or fairness of the mortgage lien or debt, he may make an affidavit of the grounds upon which he relies to defeat such mortgage, and upon filing the same with the levying officer, together with a bond and good security, payable to the mortgagee, and conditioned to pay all costs and damages incurred by the delay if the issue be found against the contestant, it shall be the duty of such officer to return the same to the court to which the mortgage execution is made returnable, to be tried in the manner prescribed above for an affidavit of illegality by the mortgagor.

The holder of a mortgage of real or personal property, or both, is also at liberty to foreclose in equity according to the practice of the courts of equity.¹

¹ Acts 1880-1881, p. 127; Code 1882, § 3979 a.

It is also provided by statute that any person having a mortgage on personal

724. Idaho Territory.¹— Any mortgage of personal property, when the debt to secure which the mortgage was given is due, may be foreclosed by notice and sale as hereinafter provided, or it may be foreclosed by action in the district court having jurisdiction in the county in which the property is situated.

In proceeding to foreclose by notice and sale, the mortgagee, his agent or attorney, must make an affidavit stating the date of the mortgage, the names of the parties thereto, a full description of the property mortgaged, and the amount due thereon. Such affidavit must be placed in the hands of the sheriff, together with a notice signed by the mortgagee, his agent or attorney, requiring such officer to take the mortgaged property into his possession and sell the same.

The affidavit must be personally served upon the mortgagor, or other person having possession of the mortgaged property, in the same manner as is provided by the law for the service of a sum-

property to secure a debt not exceeding one hundred dollars principal, and desiring to foreclose the same, may himself, his agent or attorney, make affidavit of the amount of principal and interest due on such mortgage, which affidavit shall be annexed to such mortgage; and when such mortgage with such affidavit annexed thereto shall be filed with any justice of the peace or notary public, who is *ex-officio* justice of the peace in the county where the mortgagor resides, if a resident of this state, or, if not a resident of this state, then in the county where such mortgaged property may be, it shall be the duty of such magistrate to issue an execution, directed to all and singular the constables of this state, commanding the sale of the mortgaged property to satisfy the principal and interest, together with the costs of the proceedings to foreclose said mortgage. When the execution shall be delivered to a constable, it shall be his duty to levy on the mortgaged property wherever it may be found, and after advertising the same, giving full description of the property to be sold and the process under which he is proceeding, by written advertisement at three or more public places in the district where the defendant resides,

for thirty days next preceding such sale, he shall put up and expose to sale said property as herein provided: provided such sale shall be had within the legal hours of sale on a regular court day, and at the usual place of holding justice courts for said district; the said constable shall put up and expose said property to sale at the time and place and in the same manner as now govern at constable's sales. Such mortgagor may avail himself of any defence he may have to such foreclosure, in the same manner and upon the same conditions as now allowed by law in case of foreclosure of chattel mortgages in the superior courts; and whenever any such defence is filed by such mortgagor, the magistrate issuing such execution shall have power and jurisdiction to hear and determine the issues made thereon as in other cases at law. Laws 1878-79, p. 152, §§ 2, 3; Code 1882, §§ 3974, *u, b, c*. Constables' sales shall be advertised ten days. Acts 1883, p. 67, No. 407.

For provisions authorizing the foreclosure of mortgages in case of attachment of the property, or an attempt to remove the property beyond the limits of the county, see Laws 1883, p. 109, No. 404.

¹ R. S. 1887, §§ 3390-3396.

mons. At the time of such service of the affidavit, the officer must also serve a notice signed by himself, setting forth a full description of the property, the amount claimed to be due by the mortgagee, and the time and place of sale: provided, however, that if the mortgagor, or other person interested, cannot be found within the county wherein the mortgage is being foreclosed, and has no agent therein known to the officer, the general notice of sale directed in the next section is sufficient service upon all parties interested.

The officer must take the property into his possession, and give notice of sale in the same manner and for the same length of time as is required in cases of the sale of like property on execution, and the sale must be conducted in the same manner.

The purchaser at such sale takes all the interest which the mortgagor had in the mortgaged property at the time of the execution of the mortgage, and the officer selling must execute to him a bill of sale of the property, which must set forth the date of the mortgage, the names of the parties thereto, the date of sale, a description of the property, and the amount paid therefor.

The officer must make return upon the affidavit hereinbefore mentioned of all his proceedings, and must transmit the same by mail or otherwise to the clerk of the district court having jurisdiction in the county in which the sale was made, and the clerk must file such return in his office.

The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested in the district court by any person interested in so doing, for which purpose an injunction may issue if necessary.

725. Illinois.¹—A mortgagor of personal property may insert in his mortgage a clause authorizing the sheriff of the county in which the property, or some part thereof, is situated, to execute the power of sale therein granted to the mortgagee or his assigns or legal representatives, in which case the sheriff of such county, at the time of such sale, may advertise and sell the mortgaged premises pursuant to such power, and may execute all proper con-

¹ R. S. 1874, and R. S. 1880, ch. 95, § 11. By statute of 1879, Laws, p. 211, it is provided that all mortgages and trust deeds of real estate shall be foreclosed by action,

notwithstanding they contain powers of sale. But this statute does not apply to chattel mortgages.

veyances of the property so sold, in the name of and as the attorney in fact of the mortgagor; and at any sale made as aforesaid, the mortgagee, his assigns or legal representatives, may fairly and in good faith purchase the property, or any part thereof.

726. Indiana. — There is no statute which in terms applies to the foreclosure of mortgages of personal property. Yet it appears that such a mortgage may be foreclosed by suit. In one case it was insisted that a suit by foreclosure would not lie upon a chattel mortgage;¹ but the court, in reply, said: "As our statute places chattel mortgages on the footing of mortgages of real estate in this, that it recognizes the legal title, the equity of redemption as remaining in the mortgagor, and the mortgagee as having but a lien, it follows that a foreclosure is the proper mode of procedure to enforce the lien and extinguish the equity of redemption."

The suit is equitable in its nature.² All distinction between law and equity is removed by statute in this state.

In a suit by a mortgagee of personal property against the mortgagor and a junior mortgagee of the same property to foreclose the mortgage, and compel the junior mortgagee to account for a portion of the property which he had conveyed to his own use, no demand for the property, or for an accounting, is necessary before suit.³

Although a chattel mortgage may be foreclosed by action, yet the mortgagee may take possession of the property and sell it, without extinguishing the mortgagor's equity of redemption by action.⁴ The statutory provision, that "unless a mortgage specially provides that the mortgagee shall have possession of the mortgaged premises he shall not be entitled to the same," applies to mortgages of real estate, and not to mortgages of personal property.⁵

727. Iowa.⁶ — Any mortgage of personal property to secure the payment of money only, and where the time of payment is therein fixed, may be foreclosed by notice and sale as hereinafter

¹ *Blakemore v. Taber*, 22 Ind. 466; As to parties, see *Trittip v. Edwards*, 35 Ind. 467. quoted with approval in *Broadhead v. McKay*, 46 Ind. 595. See *Whitehead v. Pitcher*, 13 Ind. 141.

⁴ *Broadhead v. McKay*, *supra*.

⁵ *Broadhead v. McKay*, *supra*.

² See 2 Jones on Mortgages, § 1334.

³ *Woodward v. Wilcox*, 27 Ind. 207.

⁶ Code 1873, and R. Code 1880, § 3307.

provided, unless a stipulation to the contrary has been agreed upon by the parties, or may be foreclosed by action in the proper court.¹ The notice must contain a full description of the property mortgaged, together with the time, place, and terms of sale.

Such notice must be served on the mortgagor, and upon all purchasers from him subsequent to the execution of the mortgage, and all persons having recorded liens upon the same property which are junior to the mortgage, or they will not be bound by the proceedings.² The service and return must be made in the same manner as in the case of the original notice by which civil actions are commenced, except that no publication in the newspapers is necessary for the purpose, the general publication directed herein being a sufficient service upon all the parties in cases where service is to be made by publication. After notice has been served upon the parties, it must be published in the same manner, and for the same length of time, as required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner.

The purchaser shall take all title and interest on which the mortgage operated. The sheriff conducting the sale shall execute to the purchaser a bill of sale of the personal property, which shall be effectual to carry the whole title and interest purchased.

Evidence of the service and publication of the notice and of the sale made in accordance therewith, together with any postponement or other material matter, may be perpetuated by proper affidavits thereof. Such affidavits shall be attached to the bill of sale, and shall then be receivable in evidence to prove the facts they state.

Sales made in accordance with the above requirements are valid in the hands of a purchaser in good faith, whatever may be the equities between the mortgagor and mortgagee.

The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceedings may be transferred to the district or circuit court, for which purpose an injunction may issue if necessary.³

¹ The mortgagee of chattels is not confined to a foreclosure by notice and sale. He may foreclose in equity; and that is the proper course when a third party has

a conflicting claim. *Packard v. Kingman*, 11 Iowa, 219.

² As to notice to execution creditor, see *Wells v. Chapman* (Iowa, 1882), 13 N. W. Rep. 841.

³ Code, § 3317. This right is not an ab-

Deeds of trust of real or personal property may be executed as securities for the performance of contracts, and shall be considered as and foreclosed like mortgages.¹

728. Kansas.²— After condition broken, the mortgagee or his assignee may proceed to sell the mortgaged property, or so much thereof as may be necessary to satisfy the mortgage and costs of sale, having first given notice of the time and place of sale by written or printed handbills posted up in at least four public places in the township or city in which the property is to be sold, at least ten days previous to the sale.³ If the mortgagee or his assignee shall have obtained possession of the mortgaged property, either before or after condition broken, the mortgagor, or any subsequent mortgagee, may demand, in writing, a sale of such property. In such case the mortgagee shall proceed to sell the property, having first given the same notice as provided in the preceding section. If, after satisfying the mortgage and costs of sale, there be any surplus remaining, the same shall be paid to any subsequent mortgagee entitled thereto, or to the mortgagor or his assigns.

729. Kentucky.⁴— In an action to enforce a mortgage of, or lien upon, personal property, if it satisfactorily appear from a verified petition, or from affidavits or the proofs in the cause, that the plaintiff has a just claim, and that the property is about to be sold, concealed, or removed from the state, or if the plaintiff state on oath that he has reasonable cause to believe and does believe that, unless prevented by the court, the property will be sold, concealed, or removed from the state, an attachment may be granted against the property. In an action to enforce a mortgage or lien, judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally. Every sale made under an order of court must be public, upon reasonable

solite one, and does not exist where the appellant has a full and complete remedy in a pending action at law. *Sweet v. Oliver*, 56 Iowa, 744.

¹ See *Newman v. De Lorimer*, 19 Iowa, 244.

² *Dassler's Compiled Laws* 1885, §§ 3507-3509. This statutory form of fore-

closure does not exclude a foreclosure in accordance with the terms of a power contained in the mortgage. *Denny v. Van Dusen*, 27 Kans. 437.

³ The parties may by agreement waive notice of sale. § 775 a.

⁴ *Bullitt's Codes* 1876; *Civil Code*, §§ 249, 376, 695-698.

credits to be fixed by the court, not less, however, than three months for personal property; and shall be made after such notice of the time, place, and terms of sale as the order may direct; and unless the order direct otherwise, shall be made at the door of the court-house of the county in which the property, or the greater part thereof, may be situated; and the notice of sale must state for what sum of money it is to be made. The purchaser of property sold under an order of court shall give a bond for the price, with good surety approved by the officer making the sale, payable to him or to the person entitled to receive the money, as the court may direct; or, if the court make no order on the subject, it shall be made payable to the officer. It shall bear interest from date at the rate the judgment bears. It shall have the force of a judgment; and on executions issued upon it no replevy shall be allowed, and sales shall be for cash. The purchaser of personal property sold under an order of court shall be entitled to it upon complying with the terms of sale.

730. Maine.¹— When the condition of a mortgage of personal property is broken, the mortgagor, or person lawfully claiming under him, may redeem it at any time before it is sold, by virtue of a contract between the parties or on execution against the mortgagor, or before the right of redemption is foreclosed, as hereinafter provided, by paying or tendering to the mortgagee or the person holding the mortgage by assignment thereof, recorded where the mortgage is recorded, the sum due thereon, or by performing or offering to perform the conditions thereof, when not for the payment of money, with all reasonable charges incurred; and the property, if not immediately restored, may be replevied, or damages for withholding it recovered in an action on the case.

The mortgagee or his assignee, after condition broken, may give to the mortgagor or his assignee, when his assignment is recorded where the mortgage is recorded, written notice of his intention to foreclose the same, by leaving a copy thereof with the mortgagor or such assignee, or if the mortgagor is out of the state, although resident therein, by leaving such copy at his last and usual place of abode, or by publishing it once a week, for three successive weeks, in one of the principal newspapers published in the town where the mortgage is recorded. When the mortgagor or his as-

¹ R. S. 1883, ch. 91, §§ 3-6.

signee of record is not a resident of the state, and no newspaper is published in such town, such notice may be published in any newspaper printed in the county where the mortgage is recorded.

The notice, with an affidavit of service or a copy of the last publication, with the name and date of the paper containing it, shall be recorded where the mortgage is recorded, and the copy of such record is evidence that the notice has been given. If the mortgagee or his assignee is not a resident of the state, he shall at the time of recording such notice record therewith his appointment of an agent, resident in the same town, to receive satisfaction of the mortgage; and payment or tender thereof may be made to him. If he does not appoint such agent, the right to redeem is not forfeited. The right to redeem shall be forfeited, except as provided in the preceding sections, if the money to be paid or other thing to be done is not paid or performed, or tender thereof made, within sixty days after such notice is recorded; but nothing in the preceding sections defeats a contract of bottomry, respondentia, transfer, assignment, or hypothecation of a vessel or goods at sea or abroad, if possession is taken as soon as may be after their arrival in the state.¹

731. Maryland.²—In all mortgages there may be inserted a clause authorizing the mortgagee or any other person to be named therein to sell the mortgaged premises, whether lands or goods and chattels, upon such terms and on such contingencies as may be expressed therein; and when the interests in any mortgage are held under one or more assignments, or otherwise, the power of sale therein contained shall be held divisible, and he or they holding any such interest who shall first institute proceedings to execute such power shall thereby acquire the exclusive right to sell the mortgaged premises. Before any person so authorized shall make any such sale, he shall give bond to the state in such penalty and with such security as shall be approved by the judge or clerk of a court of equity of the city or county in which the goods or chattels may be, to abide by and fulfil any order or de-

¹ *Clapp v. Glidden*, 39 Me. 448; *Winchester v. Ball*, 54 Me. 558.

The mortgagee's title becomes absolute by operation of law in sixty days after the condition is broken. The sixty days after which the right to redeem is forfeited com-

mence to run from the time the notice provided for in the statute commences to run. *Trask v. Pennell*, 59 Me. 419.

² Laws 1878, ch. 483, § 5; Code 1860, vol. i. art. 64, §§ 6-11; Rev. Code 1878, art. 66, §§ 47-53.

cree which shall be made by any court of equity in relation to the sale of such mortgaged property or the proceeds thereof, and such bond shall be and remain as an indemnity to and for the security of all persons interested in such mortgaged property or the proceeds thereof, and be subject to be sued as other bonds taken in the name of the state, and subject to the same limitations and disabilities as such other bonds. In all sales made in pursuance of such authority, there shall be given such notice as may be stated in such mortgage, or, if there be no agreement as to notice, then the party offering the same for sale shall give twenty days' notice of the time, place, and terms thereof, by advertisement in some newspaper printed in the county where the mortgaged premises lie, if there be one so published, and if not, in a newspaper having a large circulation in said county, and also by advertisement set up at the court-house door of said county. All such sales shall be reported under oath to the court having chancery jurisdiction where the sale is made, and there shall be the same proceedings on such report as if the same were made by a trustee under a decree of said court, and the court shall have full power to hear and determine any objections which may be filed against such sale by any person interested in the property, and may confirm or set aside said sale. If said sale be set aside by the court, a resale may be ordered to be made by the party who made the previous sale, or the court may, if justice requires it, appoint a trustee to sell the same. All such sales, when confirmed by the court and the purchase money is paid, shall pass all title which the mortgagor had at the time of the recording of the mortgage. Upon a sale of such mortgaged premises, any person claiming an interest in the equity of redemption may apply to the court confirming the sale to have the surplus of the proceeds of the sale, after payment to the mortgagee of his claim and expenses, paid over to such person, or so much thereof as will satisfy his claim, and the court shall distribute such surplus equitably among the claimants thereto.

When any suit is instituted to foreclose a mortgage, the court may decree that, unless the debt and costs be paid by a day fixed by the decree, the property mortgaged, or so much thereof as may be necessary for the satisfaction of said debt and cost, shall be sold, and such sale shall be for cash, unless the complainant shall consent to a sale on credit; and if upon the sale, under such de-

cree, of the whole mortgaged property, the net proceeds thereof, after the costs allowed by the court are satisfied, shall not suffice to satisfy the mortgage debt and accrued interest, as this shall be found by the judgment of the court upon the report of the auditor thereof, the court may, upon the motion of the complainant, enter a decree *in personam* against the mortgagor or other party to the suit who is liable for the payment thereof: provided the mortgagee would be entitled to maintain an action at law upon the covenants contained in said mortgage for said residue of the said mortgage debt, so remaining unsatisfied by the proceeds of such sale, which decree shall have the same effect as a judgment at law, and may be enforced only in like manner by a writ of execution in the nature of a writ of *fiery facias*, or otherwise.¹

732. Massachusetts.² — When the condition of a mortgage of personal property has been broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the mortgaged property at any time before it is sold, in pursuance of the contract between the parties, or before the right of redemption is foreclosed as hereinafter provided.

The person entitled to redeem shall pay or tender to the mortgagee, or to the person holding under him, the sum due on the mortgage, or shall perform or offer performance of the thing to be done, and shall pay all reasonable and lawful charges and expenses incurred in the care and custody of the property, or otherwise arising from the mortgage; and if upon such payment or performance, or upon tender thereof, the property is not forthwith restored, the person entitled to redeem may recover it in an action of replevin, or may recover, in any action adapted to the circumstances of the case, such damages as he may sustain by the withholding thereof.

The mortgagee or his assigns may, after condition broken, give to the mortgagor, or to the person in possession of the property claiming the same, written notice of his intention to foreclose the mortgage for breach of the condition thereof, which notice shall

¹ Rev. Code 1878, art. 66, § 65.

² G. S. ch. 151, §§ 4-8; P. S. 1882, ch. 192, §§ 5-9.

The first regulation on this subject is found in R. S. 1836, ch. 107, § 40, by which

the mortgagor is allowed to redeem at any time within sixty days after condition broken. The present statute is substantially that first enacted in 1843, ch. 72, § 1.

be served by leaving a copy with the mortgagor, or person in possession of the property claiming the same, or by publishing it at least once a week, for three successive weeks, in one of the principal newspapers published in the town or city where the mortgage is properly recorded, or where the property is situated, or, if there is no such paper, in one of the principal newspapers published in such county.¹

The notice, with an affidavit of the service thereof, shall be recorded wherever the mortgage is recorded, and such notice and affidavit, when so recorded, or a copy of the record thereof, shall be admitted as evidence of the giving of the notice.²

If the money to be paid, or other thing to be done, is not paid or performed, or tender thereof made, within sixty days after such notice is so recorded, the right to redeem shall be foreclosed.³

733. In Michigan a mortgagee of chattels is not bound to file a bill in equity to foreclose the mortgagor's right of redemption;

¹ If the mortgage note is payable on demand, such a note being in law payable immediately, no demand is necessary to constitute a breach of condition, and the mortgagee may, immediately after the giving of the mortgage, and without making any demand whatever, give notice of his intention to foreclose. *Southwick v. Hapgood*, 10 Cush. 119, 121; *Goodrich v. Willard*, 2 Gray, 203, 204.

A policy of insurance conditioned to become void "if the title of the property is transferred or changed," and which provides that "the entry of a foreclosure of a mortgage shall be deemed an alienation," is avoided by giving and recording such notice of intention to foreclose the mortgage. *McIntire v. Norwich F. Ins. Co.* 102 Mass. 230.

² When a mortgage is valid without being recorded, a notice of intention to foreclose is valid without registration. The statute requiring the recording of such notice is inapplicable in such case. *Taber v. Hamlin*, 97 Mass. 489.

The failure of the town clerk to index the notice and affidavit does not affect the rights of the mortgagee. *Burtis v. Bradford*, 122 Mass. 129.

³ A mortgage given by one who has afterwards become insolvent may, in certain cases, be redeemed by his assignee in insolvency within sixty days after his appointment. Stat. 1862, ch. 172, § 7.

Whether a bill in equity can be sustained under any circumstances to foreclose a chattel mortgage seems to be an undecided question; but it has been decided that such a bill does not lie to foreclose a mortgage of patent rights of which the mortgagee already holds an assignment absolute in form, made as a part of the transaction of the mortgage. The statute remedy is sufficient. *Boston & Fairhaven Iron Works v. Montague*, 108 Mass. 248.

The owner of personal property, of which he is in possession, is not entitled to relief in equity on the ground that a mortgagee is about to foreclose a mortgage which the owner of the property alleges has been paid, by reason of which a cloud would rest on his title. He has full opportunity to contest the validity of the mortgage in the proceedings to foreclose it. *Bushnell v. Avery*, 121 Mass. 148.

but he may foreclose it by his own act, by proceeding to sell the property after due notice, or to sell it in accordance with a power of sale contained in the mortgage; and in such case any surplus remaining after payment of the mortgage debt is held by the mortgagee in trust for the mortgagor.¹

There is no general statute in terms applicable to the foreclosure of chattel mortgages; but it would seem that there is jurisdiction in equity to foreclose such mortgages.² It is provided by a recent statute that at any sale of property upon foreclosure of a chattel mortgage or of a pledge, the mortgagee or pledgee, his assigns or representative, may fairly and in good faith purchase the property so offered for sale, or any part thereof.³

734. Minnesota.⁴—When the condition of a mortgage of personal property is broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the same at any time before the property is sold, in pursuance of the contract between the parties, or the right of redemption is foreclosed as hereinafter provided. The person entitled to redeem shall pay or tender to the mortgagee, or person holding under him, the sum due on the mortgage, or offer performance of the thing to be done, and shall pay all reasonable and lawful charges and expenses incurred in the care and custody of the property, or otherwise arising from the mortgage; and if, upon such payment or performance, or tender thereof, the property is not forthwith restored, the person entitled to redeem may recover it in a civil action, with such damages as he may have sustained by the withholding thereof.

The mortgagee or his assigns, after condition broken, may give to the mortgagor, or the person in possession of the property claiming the same, written notice of his intention to foreclose the mortgage for breach of the condition thereof, which notice shall be served by leaving a copy with the mortgagor, or a person in possession of the property claiming the same, or by publishing it at least once a week, for three successive weeks, in a newspaper printed and published in the county or city where the mortgage is properly recorded, or where the property is situated, or if there

¹ *Flanders v. Chamberlain*, 24 Mich. 305, 314, per Christiancy, C. J.

² For provisions for the foreclosure of mortgages in chancery, see 2 Jones on Mortgages, § 1342.

³ Laws 1877, p. 45, No. 57; amended, Acts 1887, p. 184, No. 178.

⁴ G. S. 1878, ch. 39, §§ 8, 9, 13.

be no such paper, in a newspaper printed and published at the capital of the state. But the mortgagee is not deprived of his remedy by sale, in cases where such sale is authorized by the mortgage. The notice, with an affidavit of service, shall be filed wherever the mortgage is filed, and when so filed, the same, or a copy thereof, shall be admitted as evidence of the giving of such notice. If the money to be paid, or other thing to be done, is not paid or performed, or tender thereof made within sixty days after such notice is so filed, the right to redeem shall be foreclosed.¹

Whenever the mortgagee has a remedy by sale of the mortgaged property authorized by the terms of the mortgage in case of default, such mortgaged property shall not be sold at private sale, but only upon previous written notice given at least ten days before such sale, by serving a copy of such notice upon the mortgagor, or upon the person in possession of the property claiming the same, if such person can be found within the city, village, or town where the mortgage is filed, or if such mortgagor or person cannot be found within such city, village, or town, then by posting three copies of such notice as follows: one copy in each of three of the most public places of the city, village, or town where the mortgage is filed, or where the property is seized or taken under the mortgage.

No mortgagee, nor any one claiming under him, shall have any right, arbitrarily or without just cause based upon the actual existence of facts, to declare any of the conditions or stipulations of a mortgage broken, prior to the time of default in the payment of such mortgage, or prior to the time when the conditions of such mortgage should be performed.²

735. Mississippi.³ — Foreclosure is under the general jurisdiction of courts of equity.⁴ It is provided by statute that when any mortgage or deed of trust shall be given on any real or personal estate, or when any lien shall be given by law to secure the payment of any sum of money specified in any writing, no action or suit or other proceeding shall be brought or had upon such lien, mortgage, or deed of trust, to recover the sum of money so secured, but within the time that may be allowed for the com-

¹ G. S. 1878, ch. 39, §§ 10-12.

³ Code 1880, § 2667.

² Laws 1879, §§ 1, 2.

⁴ See 2 Jones on Mortgages, § 1344.

menacement of an action at law, upon the writing in which the sum of money secured by such mortgage or deed of trust may be specified; and in all cases where the remedy at law to recover the debt shall be barred, the remedy in equity on the mortgage shall be barred.

736. Missouri.¹ — All mortgagees of real estate or personal estate, including leasehold interests, when the debt or damages secured amounts to fifty dollars or more, may file a petition in the office of the circuit court against the mortgagor and the actual tenants or occupiers of such real estate, or persons in possession of personal property, setting forth the substance of the mortgage deed, and praying that judgment may be rendered for the debt or damages, and that the equity of redemption may be foreclosed, and the mortgaged property sold to satisfy the amount due.

Deeds of trust, in the nature of mortgages, may, at the option of the *cestuis que trust*, their executors, or administrators, or assignees, be foreclosed by them, and the property sold in the same manner, in all respects, as in case of mortgages. If any part of the property be real estate, the petition may be filed in any county where any part of the mortgaged premises is situated; if it be exclusively personal estate, it may be filed and proceeded with as in other civil actions.

In all mortgages in which personal estate alone is conveyed,² and the debt secured thereby, exclusive of interest, shall not exceed one hundred dollars, the mortgagee or his personal representatives, upon default being made in the payment of the mortgage debt by the mortgagor or his legal representatives, may sell the mortgaged property, or so much thereof as will satisfy his debt, giving the mortgagor, after default in the payment of the debt, sixty days' previous notice, in writing, that the mortgaged property will be sold unless the debt secured by it is paid, and giving thirty days' notice of the time and place of sale; the notice to be published in the same manner as a sheriff's notice of the sale of real estate. All mortgages of real or personal property, or both, with powers of sale in the mortgagee, and all sales made by such mortgagee or his personal representatives, in pursuance of the provisions of such mortgages, shall be valid and binding, by

¹ 2 Wagner's Stat. ch 99, §§ 1 3; 1 R. ² R. S. 1879, vol. 1, §§ 3309, 3310.
S. 1879, §§ 3297, 3298.

the laws of this state, upon the mortgagors and all persons claiming under them, and shall forever foreclose all right and equity of redemption of the property so sold.

737. Montana Territory.¹—An action for the foreclosure of a mortgage of personal property, or the enforcement of any lien thereon of whatever nature, may be commenced and conducted in the same manner as provided by law for the foreclosure of mortgages and liens upon real property, and the same may be joined in an action for the recovery of the possession of the property mortgaged; but it shall be lawful for the mortgagor of goods, chattel or personal property, to insert in his mortgage a clause authorizing the sheriff of the county in which such property or any part thereof may be, to execute the power of sale therein granted to the mortgagee, his legal representative and assigns, in which case the sheriff of such county, at the time of such sale, may advertise and sell the mortgaged property in the manner provided in such mortgage; and at any such sale, made as aforesaid, the mortgagee, his representative or assigns, may in good faith purchase the property so sold or any part thereof.

There shall be but one action for the recovery of any debt, or the enforcement of any rights, secured by mortgage upon real estate or personal property, which action shall be in accordance with the following provisions.² In actions for the foreclosure of mortgages, the court shall have the power, by its judgment, to direct a sale of the incumbered property, or as much as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and expenses of the sale, and the amount due to the plaintiff; and if it appear from the sheriff's return that the proceeds are insufficient, and a balance still remains due, judgment shall be docketed for such balance against the defendant or defendants personally liable for the debt, and shall then become a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued. No person holding a conveyance from or under the mortgagor, or of the property mortgaged, or having a lien thereon, which conveyance does not appear on record in the proper office at the time of the commencement of the action, need be made a party to such action; and the judgment, and proceedings therein had, shall be

¹ Comp. Stats. 1887, § 1550.

² Comp. Stats. 1887, §§ 358-360.

as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to said action, and shall in all respects have the same force and effect.

If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court.

If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

738. Nebraska.¹—Every mortgage of personal property containing and giving to the mortgagee or any other person a power to sell the property described therein, upon default being made in any condition of such mortgage, may be foreclosed in the cases and in the manner hereinafter specified. To entitle any person to foreclose a chattel mortgage it shall be requisite: First. That some default in a condition of such mortgage shall have occurred, by which the power to sell became operative. Second. That if no suit or proceeding shall have been instituted at law to recover the debt then remaining secured by such mortgage or any part thereof, or if any suit or proceeding has been instituted that the same has been discontinued, or that an execution upon the judgment rendered thereon has been returned unsatisfied in whole or in part. Third. That such mortgage, containing the power of sale, has been duly recorded.

Notice that such mortgage will be foreclosed, by a sale of the mortgaged property or some part thereof, shall be given as follows: By advertisement published in some newspaper printed in the county in which such sale is to take place, or, in case no news-

¹ Compiled Stats. 1885, ch. 12, §§ 1-8. There is jurisdiction in equity to foreclose a chattel mortgage, where there is a question of priority as regards other chattel mortgages upon the same property, and

the conflicting claims must be adjusted, and there is an application for a receiver, for a sale of the property and distribution of the proceeds. *Leopold v. Silverman* (Mont.), 16 Pac. Rep. 580.

papers are printed therein, by posting up notices in at least five public places in said county, two of which shall be in the precinct where the mortgaged property is to be offered for sale, and such notice shall be given at least twenty days prior to the day of sale.

Every such notice shall specify : First. The date of the mortgage and where recorded. Second. The name of the mortgagor and mortgagee, and the assignee of the mortgage, if any. Third. The amount claimed to be due thereon at the time of the first publication or posting of such notice. Fourth. A description of the mortgaged property conforming substantially with that contained in the mortgage. Fifth. The time and place of sale.

Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale shall be postponed ; or in case no newspaper is published in the county in which such sale is to be had, by posting a notice of such adjournment in some conspicuous place at the place designated in the original notice posted for the sale to be had.

Such sale shall be at public auction in the daytime, between the hours of ten A. M. and four P. M., in the county where the mortgage was first recorded, or in any county where the property may have been removed, by consent of parties, and in which the mortgage was duly recorded, and in view of said property.¹

The mortgagee, his assigns, and his or their legal representatives, may fairly and in good faith purchase any of the mortgaged property at such sale. When a mortgage shall have been foreclosed as herein provided, any and all right of equity of redemption which the mortgagor may or might have had shall be and become extinguished.

739. Nevada.²— There shall be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage or lien upon real estate or personal property. In such action, judgment shall be rendered for the amount found due the plaintiff, and the court shall have power, by its decree or judg-

¹ Where the property has been removed by consent of the parties from the county in which the mortgage was recorded into another county, the mortgage must be filed

in the latter county before a foreclosure sale can be had in that county. *Loeb v. Milner*, 21 Neb. 392 ; 32 N. W. Rep. 205.

² G. S. 2885, §§ 3270-3272. See § 707.

ment, to direct a sale of the incumbered property, or such part thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs and expenses of the sale, the costs of the suit, and the amount due to the plaintiff. If it shall appear from the sheriff's return that there is a deficiency of such proceeds and a balance still due to the plaintiff, the judgment shall then be docketed for such balance against the defendant or defendants personally liable for the debt, and shall, from the time of such docketing, be a lien upon the real estate of the judgment debtor, and an execution may thereupon be issued by the clerk of the court, in like manner and form as upon other judgments, to collect such balance or deficiency from the property of the judgment debtor. If there be surplus money remaining after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court.

If the debt for which the mortgage, lien, or incumbrance is held be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

740. New Hampshire.¹—When the condition of any mortgage of personal property has been broken, the mortgagor may redeem the same by paying or tendering to the mortgagee the amount due on such mortgage, with all reasonable expenses incurred by reason of such breach of condition, at any time before a sale thereof as provided by statute.

The mortgagee may, at any time after thirty days from the time of condition broken, sell the mortgaged property, or any part thereof, at auction, notice of the time, place, and purposes of such sale being posted at two or more public places in the town in which such sale is to be, four days at least prior thereto.

The mortgagee shall notify the mortgagor of the time and place

¹ G. S. 1878, ch. 123, §§ 18-21.

of sale, either by notice in writing delivered to the mortgagor, or, if a corporation, to the person on whom legal process may be served, or left at his abode, if within the town, at least four days previous to the sale. If the mortgagor does not reside in the town, such notice sent by mail shall be sufficient.

The mortgagee may be a purchaser at such sale, and the proceeds of such sale shall be applied by him to the payment of the demand secured by such mortgage, and the expenses of keeping and sale; and the residue shall be paid to the mortgagor on demand.

741. New Jersey.¹—The foreclosure of chattel mortgages is under the general jurisdiction of courts of chancery; and the proceedings are the same as those had for the foreclosure of mortgages of real estate. It is specially provided that in any suit for the foreclosure of a mortgage upon or which may relate to real or personal property, all persons claiming an interest in or an incumbrance or lien upon such property, by or through any conveyance, mortgage, assignment, lien, or any instrument which, by any provision of law, could be recorded, registered, entered, or filed in any public office in this state, and which shall not be so recorded, registered, entered, or filed at the time of filing the bill in such suit, shall be bound by the proceedings in such suit, so far as the said property is concerned, in the same manner as if he had been made a party to and appeared in such suit, and the decree therein made against him as one of the defendants therein; but such person, upon causing such conveyance, mortgage, assignment, lien, claim, or other instrument to be recorded, registered, entered, or filed as provided by law, may cause himself to be made a party to such suit by petition, in the same manner as is provided in the case of persons acquiring an interest in the subject matter of a

¹ R. S. 1877, p. 118, § 78.

It shall and may be lawful to foreclose any chattel mortgage, not exceeding the principal sum of two hundred dollars, in the inferior court of common pleas in the county where the chattel mortgage is recorded, and the proceedings of foreclosure thereon shall be begun by summons, and the action be styled an action "in debt on foreclosure of chattel mortgage;" and the complainant shall file, with his decla-

ration, the chattel mortgage and note, or other obligation (if any accompanying it), and the proceedings in all other respects shall be conducted as other suits in action of debt are conducted.

The costs of a suit upon foreclosure under this act shall be one half of the costs of suits as now are allowed by law in the inferior court of common pleas and upon judgments. §§ 1, 2, Laws 1881, p. 207.

suit after its commencement: the petition in such case must set forth such instrument at length, and the title and interest of such party in such a manner as to show that he has an interest in the subject matter, and is a proper party in that suit.

742. New Mexico Territory.¹— After condition broken, the mortgagee or his assignee may proceed to sell the mortgaged property, or so much thereof as shall be necessary to satisfy the mortgage and costs of sale; having first given notice of the time and place of sale by written or printed handbills, posted up in at least four public places in the township in which the property is to be sold, at least ten days previous to the day of the sale. If the mortgagee or his assignee shall have obtained possession of the mortgaged property, either before or after condition broken, the mortgagor, or any subsequent mortgagee, may demand in writing a sale of the property. In such case the mortgagee shall proceed to sell the property, having first given the notice as provided. If after satisfying the mortgage and costs of sale there shall be any surplus remaining, the same shall be paid to any subsequent mortgagee entitled thereto, or to the mortgagor or his assignee.

743. New York.— There is no statute specially applicable to the foreclosure of mortgages of personal property. After default the mortgagee may sell the property at public sale without suit, although the mortgage contains no power of sale. Such a power is usually inserted in chattel mortgages; but when such mortgages are made without a power of sale, the common method of foreclosing them is by sale without action, or judicial decree. An action should be resorted to if the mortgagee desires to recover any deficiency there may be after applying the proceeds of the property to the payment of the debt. The proceeding for this purpose is in equity, or by an equitable action under the Code.²

744. North Carolina.³— A debt not exceeding three hundred dollars in amount may be secured by a deed of trust of personal property containing a power to sell said property, or so much

¹ Comp. Laws 1884, §§ 1595-1597.

³ Battle's Revisal 1873, ch. 35, §§ 31-

² See § 707.

33; Code 1883, § 1273.

thereof as may be necessary, by public auction, for cash, first giving twenty days' notice at three public places, and apply the proceeds of such sale to the discharge of said debt and interest on the same, and pay the surplus to the mortgagor. No sale under such mortgage shall be made without giving at least twenty days' notice of the time of sale.

Where any trustee of a deed of trust has died, removed from the county where the deed was executed, or from the state, or in any way become incompetent to execute the said trust, the judge of probate of the county wherein the said deed of trust was executed is authorized and empowered to appoint some discreet and competent person to act as trustee, and execute the deed of trust according to its true intent and meaning, and as fully as if appointed by the parties to the deed.

745. Ohio.¹— There is no statute specially applicable to the foreclosure of chattel mortgages. Courts of equity have general jurisdiction of the subject. When the court has jurisdiction of the parties in interest, it is not necessary to a decree of foreclosure that the property should be within the territorial jurisdiction of the court. The object of the suit is to foreclose the equity of redemption. This can as well be done on a failure to redeem within the specified time, by ordering a sale through a master, as by compelling a release or cutting off the equity by absolute decree. The nature of the suit is not that of a proceeding *in rem*, but *in personam*; and the court, as a court of equity, has full authority acting upon the parties, to deal and adjudicate in respect to the rights of the parties in the property, without regard to where the property itself is located, as the ends of justice may require. Courts of equity, in ordering a sale of property, follow the rules regulating sales on execution, when they are applicable. But where the subject with which the court is dealing is such that these rules cannot be applied without defeating the ends of justice, they will be disregarded.²

746. Oregon.³— A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage

¹ Means v. Worthington, 22 Ohio St. 622.

³ G. L. 1872, pp. 196, 197; Annotated Laws 1887, §§ 414-422 of Civil Code.

² Means v. Worthington, *supra*.

or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby, by a suit. If a promissory note or other personal obligation for the payment of the debt has been given, the court also decrees a recovery of the amount of such debt. Any person having a lien subsequent to the plaintiff upon the same property, who has given a promissory note or other personal obligation for the payment of the debt, must be made a defendant in the suit; and any person having a prior lien may be made defendant at the option of the plaintiff, or by order of the court. Any defendant having a lien may have a decree in the same manner as if he were plaintiff. When a decree is given foreclosing two or more liens upon the same property, or any portion thereof, in favor of different persons not united in interest, such decree must determine and specify the order of time, according to their priority, in which the debts secured by such liens shall be satisfied out of the proceeds of the sale of the property.

The decree may be enforced by execution, as an ordinary decree for the recovery of money, except that when a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold. If the decree is in favor of the plaintiff only, the execution may issue as in ordinary cases; but if it be in favor of different persons, not united in interest, it shall issue upon the joint request of such persons, or upon the order of the court or judge thereof, on the motion of either of them; when the decree is also against the defendants or any one of them in person, and the proceeds of the sale of the property upon which the lien is foreclosed is not sufficient to satisfy the decree, as to the sum remaining unsatisfied the decree may be enforced by execution as in ordinary cases. When, in such case, the decree is in favor of different persons, not united in interest, it shall be deemed a separate decree as to such persons, and may be enforced accordingly.¹

During the pendency of an action of law for the recovery of a debt secured by any lien, a suit cannot be maintained for the foreclosure of such lien, nor thereafter, unless judgment be given in such action that the plaintiff recover such debt, or some part thereof, and an execution thereon against the property of the de-

¹ Proceedings supplemental to execution are purely legal, and cannot be used for the purpose of enforcing a lien which the execution creditor has by virtue of a chattel mortgage on the property. *Knowles v. Herbert*, 11 Oreg. 240.

fendant in the judgment is returned unsatisfied in whole or in part. When a suit is commenced to foreclose a lien by which a debt is secured, which debt is payable in instalments either of interest or principal, and any of such instalments is not then due, the court shall decree a foreclosure of the lien, and may also decree a sale of the property for the satisfaction of the whole of such debt, or so much thereof as may be necessary to satisfy the instalment then due, with costs of suit; and in the latter case the decree of foreclosure as to the remainder of the property may be enforced by an order of sale, in whole or in part, whenever default shall be made in the payment of the instalments not then due.

If, before a decree is given, the amount then due, with the costs of suit, is brought into court and paid to the clerk, the suit shall be dismissed; and if the same be done after decree and before sale, the effect of the decree as to the amount then due and paid shall be terminated, and the execution, if any have issued, be recalled by the clerk. When an instalment not due is adjudged to be paid, the court shall determine and specify in the decree what sum shall be received in satisfaction thereof, which sum may be equal to such instalment, or otherwise, according to the present value thereof.

It is also provided in Oregon¹ that whenever the condition of any mortgage of goods and chattels shall be broken, the mortgagee shall be entitled to the immediate possession of the mortgaged property; and when, after the breach of condition of any such mortgage, the possession of the mortgaged property shall not be delivered up to the mortgagee, upon demand by him, or by any person duly authorized by him to make such demand of the person or persons having such mortgaged property in possession, the mortgagee may recover the possession of such mortgaged property.

Whenever, in any mortgage of goods and chattels, the parties to such mortgage shall have provided the manner in which such mortgage may be foreclosed, such mortgage, upon breach of the condition thereof, may be foreclosed in the manner therein provided, and not otherwise; and if in any such mortgage the manner in which the same may be foreclosed shall not be provided,

¹ G. L. 1872, p. 688, §§ 1, 2, 3; Annoted Laws 1887, §§ 3837-3839. See *Jacobs v. McCalley*, 8 Oreg. 124; *Sears v. Abrams*, 10 Oreg. 499.

then, upon breach of the conditions thereof, in case the consideration of such mortgage shall not exceed the sum of five hundred dollars, the same may be foreclosed, and the mortgaged property sold by the sheriff, or any constable of the county in which such mortgage has been filed, upon the written request of the mortgagee, his agent or attorney, upon such notice and in the manner provided by law for the sale of personal property upon execution; and if the consideration of such mortgage shall exceed the sum of five hundred dollars, the same may be foreclosed by an action at law in the circuit court of the county in which such mortgage may have been filed.¹

Upon the sale of any mortgaged property, as above provided, the sheriff or constable making the same shall forthwith make his return of his proceedings to the clerk of the county in which such sale shall have been had, and after deducting the costs and expenses of sale, and satisfying such mortgage in full, he shall deposit the balance of the proceeds, if any, with such clerk, subject to the order of the mortgagor.

747. Pennsylvania.²— Only certain specified articles of personal property are subject to mortgage. In case the sum secured by any such mortgage, or any part thereof, shall remain unpaid, after the time specified therein for the payment thereof, it shall be lawful for the mortgagee, or his agent duly constituted, after having given said mortgagor or his legal representative thirty days' notice, either personally or by public advertisement, inserted four times, at intervals of one week each, in some daily or weekly newspaper published in the county wherein the mortgage is recorded, to cause the said chattels to be sold at public auction, having first given not less than ten days' notice of the time and place of such sale, by not less than ten written or printed, or partly written and partly printed, handbills, posted in the most public places in the vicinity. In case the proceeds of sale shall more than repay the debt or balance due and the costs of sale, the remainder shall be paid forthwith to the mortgagor, or his agent

¹ Where the mortgagee is empowered to sell, he may appoint an agent to take charge of the property for him; but, except in the cases specifically designated by the statute, he cannot call to his aid

the official character of the sheriff or other officer named therein. *Pitcock v. Jordan*, 13 Pac. Rep. 510.

² Purdon's Ann. Dig. p. 2005, §§ 14, 15.

duly constituted, or to the legal representatives of the mortgagor. When the condition of a mortgage of personal property is broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the same at any time before the property is sold, by the payment of the debt, interest, and costs.

748. Rhode Island.¹—Whenever the condition of any mortgage of personal property has been broken, the mortgagor, or any person lawfully claiming or holding under him, may redeem the same at any time within sixty days thereafter, unless the property shall in the mean time have been sold in pursuance of the contract between the parties.²

The person entitled to redeem the property shall pay or tender to the mortgagee, or to the person holding under him, the sum due on the mortgage, with all reasonable and lawful charges and expenses incurred in the care and custody of the property, or otherwise arising from the mortgage thereof; and if the property is not forthwith restored, the person entitled to redeem the same may recover it in an action of replevin, or may recover such damages as he may have sustained by the withholding thereof in any proper action.

Any person entitled in equity to redeem any mortgaged property, whether real or personal, may prefer a bill to redeem the same to the Supreme Court in the county in which the real estate sought to be redeemed is situated, or in which the mortgagor of personal property may reside, if in this state, and if not, then in any county in this state, which bill may be heard, tried, and determined by said court, according to the usages in chancery and the principles of equity.

Any person entitled to foreclose the equity of redemption in any mortgaged estate, whether real or personal, may prefer a bill to foreclose the same to the Supreme Court sitting in the county in which such premises are situated, if such premises are real estate, and if personal, then in the county in which the mortgagor may reside, if in this state, and if not, then in any county in this state; which bill may be heard, tried, and determined by said

¹ P. S. 1882, ch. 176, §§ 11–15.

For cases under the statute see *Greene*

v. Dispeau, 14 R. I. 575 *Arnold v. Chapman*, 13 R. I. 586.

² See § 689 *a*.

court, according to the usages in chancery and the principles of equity.

At any sale by public auction, made under and according to the provision of any deed of mortgage, mortgage bill of sale, or other conveyance by way of mortgage, or of any power of sale contained therein or annexed thereto, the mortgagee in such deed of mortgage or other conveyance, his or their assigns, or his or their legal representatives, or any person for him or them, may fairly and in good faith bid for and purchase such estate or property so put up for sale, or any part thereof, in the same manner as the same may be bid for and purchased by any other persons: provided that notice in writing of the mortgagee's intention to bid shall be given to the mortgagor, or left at his last and usual place of abode, twenty days prior to the time of sale at which he proposes to bid as mortgagee, and that proper evidence that such notice has been given shall be in the possession of the auctioneer at the time the sale takes place; or that such mortgagee shall, in his public advertisement of sale, give notice that it is his intention to bid upon such property as advertised for sale.

749. In South Carolina mortgages are foreclosed by suit in the nature of a suit in equity.¹ The court shall have power to adjudge and direct the payment, by the mortgagor, of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage; and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make such person a party to the action, and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person, and may enforce such judgment as in other cases.

When any personal property under pledge, mortgage, or hypothecation is sold for the purpose of satisfying the loan or debt secured by such pledge, mortgage, or hypothecation, the pledgee, mortgagee, or person holding the instrument showing the hypothecation shall advertise the said sale by posting a notice thereof, in writing, in three public places in the county in which he is, one of

¹ R. S. 1873, p. 610, § 190; Acts 1879, No. 189, § 3; Code of Civ. Procedure, 1882, § 188, subdivision.

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which shall be the court-house door, or shall publish the same at least three times in a newspaper published in his county; unless the person making such pledge, mortgage, or hypothecation, or his legal representative, shall consent to a sale in some other mode, or at some other notice, such consent to be expressed in writing.¹

750. Tennessee.—Foreclosure is by bill in chancery and a sale under decree, unless the mortgage contain a power of sale, or be in the form of a trust deed with such power, which is the more usual form. There are no statutory provisions relating to foreclosure, except as regards notice of the sale when sale is made under decree of a court of chancery.²

751. Texas.³—Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages, and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and (except in judgments against executors, administrators, and guardians) that an order of sale shall issue to the sheriff, or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment; and if the property cannot be found, or if the proceeds of such sale be insufficient to satisfy the judgment, then to make the money, or any balance thereof remaining unpaid, out of any other property of the defendant, as in case of ordinary executions.

Courts of justices of the peace have jurisdiction to foreclose mortgages and enforce liens on personal property, when the amount in controversy is two hundred dollars or less, exclusive of interest.

Any creditor of a deceased person holding a claim secured by mortgage or other lien, which claim has been allowed and approved or established by suit, may obtain at a regular term of the court, from the county court of the county where the letters testamentary or administrative were granted, an order for the sale of the property upon which he has such mortgage or other lien, or so much of said property as may be required to satisfy such claim, by making his application in writing, and having the executor or

¹ G. S. 1882, § 2348.

* R. S. 1879, art. 1340, p. 210; art.

² See 2 Jones on Mortgages, § 1358.

1539, p. 232.

administrator of such deceased person cited to appear and answer the same.¹

752. Utah Territory.²—An action for the foreclosure of a mortgage on personal property, or the enforcement of any lien thereon, of whatever nature, may be commenced, conducted, and concluded in the same manner as provided by law for the foreclosure of a mortgage or lien on real property, and without the right of redemption: provided that, where the sum claimed is less than three hundred dollars, justices of the peace shall have jurisdiction for the foreclosure of the same. It shall be lawful for the mortgagor to insert in his mortgage the usual clauses of a deed of trust, with power of sale, on such notice and advertisement and in such manner as is provided for the sale of personal property taken on execution, in the trustee or trustees therein named, or in the sheriff of the county wherein said property is situated; and in such cases the trustee or trustees, or the sheriff of such county, may advertise and sell such personal property as may be provided in such clauses or in such deed of trust; and at any such sale made as aforesaid, the mortgagee, his representatives or assigns, may in good faith purchase the property so sold, or any part thereof.

753. Vermont.³—When the condition of any mortgage of personal property has been broken, the mortgagor or any person holding under him, or person holding a subsequent mortgage, may redeem the same by paying or tendering to the mortgagee the amount due on such mortgage, with all reasonable costs and expenses incurred by reason of such breach of condition, at any time before a sale thereof, or foreclosure and time of redemption expired, as hereinafter provided. The mortgagee may, after thirty days from the time of condition broken, cause the mortgaged property, or any part thereof, to be sold at public auction by a public officer, at some public place in the town where the mortgagor resides, or where said property is, notice of the time, place, and purpose of such sale being posted at two or more public places in such town at least ten days prior thereto. The mortgagee shall notify the mortgagor, or person holding under him, and persons holding subsequent mortgages, of the time and place

¹ R. S. 1879, art. 2067, p. 304.

² Laws 1878, p. 59, §§ 13-16; R. L.

³ Laws 1884, ch. 21, § 9.

1880, §§ 1976-1979.

§§ 754, 755.] STATUTORY PROVISIONS RELATING TO

of sale, either by notice in writing delivered to them, or left at their abode if within the town, or sent by mail if they do not reside in such town, at least ten days previous to the sale. The proceeds of such sale shall be applied to the payment of the demand secured by such mortgage, and the costs and expenses of keeping and sale, and the residue, if any, shall be paid to the persons holding subsequent mortgages, in their order, and the balance, after paying the mortgagees, shall be paid to the mortgagor or person holding under him, on demand.¹

The officer selling mortgaged property under these provisions shall make a written return of his doings on such sale, which he shall file in the town clerk's office where the mortgage is recorded; and the town clerk shall record such return on the page of the records containing the record of the mortgage. Such return shall particularly describe the articles sold, and state the amount received for each, and shall operate as a discharge of the lien thereon created by the mortgage.²

754. Virginia and West Virginia. — In these states foreclosure is under the general jurisdiction of a court of chancery. Mortgages, however, are seldom used, deeds of trust with power of sale being substituted in their place. There are no provisions of statute relating specifically to the foreclosure of mortgages. There are provisions relating to deeds of trust, and although these are generally executed without the intervention of the courts, yet courts of equity may be invoked in any case to supervise the enforcing of them. These provisions, however, relate to the form of such trust deeds, and authorize sales as therein provided.³

755. Washington Territory.⁴ — Any mortgage of personal property, when the debt to secure which the mortgage was given is due, may be foreclosed by notice and sale as herein provided; or it may be foreclosed by action in the district court having jurisdiction in the county in which the property is situated. The

¹ This statutory remedy excludes other remedies, though it would seem that the mortgagee might maintain detinue or replevin to obtain possession of the property to be disposed of under the provisions of the statute. *Calkins v. Clement*, 54 Vt. 635.

² Laws 1884, p. 95, No. 107.

³ See 2 Jones on Mortgages, §§ 1362, 1364, 1761, 1762.

⁴ Gen. Laws 1879, pp. 105, 106, §§ 6-13; Code 1881, §§ 1991-1998.

notice must contain a full description of the property mortgaged, together with time and place of sale, also a statement of the amount due, and must be signed by the mortgagee or his attorney. Such notice shall be placed in the hands of the sheriff or other proper officer, and shall be personally served in the same manner as is provided by law for the service of a summons: provided that if the mortgagor cannot be found in the county where the mortgage is being foreclosed, it shall not be necessary to advertise the notice or affidavit in a newspaper, but the general publication hereinafter directed shall be sufficient service upon all the parties interested, and such notice shall be sufficient authority for the officer to take such property into his immediate possession. After notice has been served upon the mortgagor, it must be published in the same manner, and for the same length of time, as required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner. The purchaser shall take all interest which the mortgagor had in the said mortgaged property upon which the said mortgage operated. The officer conducting the sale shall execute to the purchaser a bill of sale of the property, which bill of sale shall be effectual to carry the whole title and interest purchased; and if any balance of the purchase price remain, it shall be disposed of in the same manner as surplus proceeds of sales are on execution.

The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any person interested in so doing, and the proceedings may be transferred to the district court, for which purpose an injunction may issue if necessary. Where the debt is not due for which the mortgage is given, and the mortgagee has reasonable cause to believe that the mortgaged property will be destroyed, lost, or removed, he shall have the right to an immediate action in the district court of the county having jurisdiction where the property is situated, for the recovery of his debt, and the court may make any order it may deem fit, in order to secure said property so as to make the same available for the satisfaction of said debt.

It is also provided in Washington Territory¹ that the provisions relating to actions for the foreclosure of mortgages of real estate may be applied, so far as they can be, to actions for the foreclosure of chattel mortgages or bills of sale creating liens on

¹ Gen. Laws 1879, pp. 128, 129, §§ 622, 623, 625.

personal property.¹ The mortgagee or holder of the lien may proceed upon his mortgage or lien, and if there be a separate obligation in writing to pay the same secured by said mortgage or lien, he may bring suit upon such separate promise. When he proceeds on the mortgage, if there be a specific agreement therein contained for the payment of a certain sum, or there is a separate obligation for said sum, in addition to a decree of sale of mortgaged property, judgment shall be rendered for the amount due upon said mortgage or other instrument, the payment of which is secured thereby. The decree shall direct the sale of the mortgaged property, and if the proceeds of said sale be insufficient under the execution, the sheriff is authorized to levy upon and sell other property of the mortgage debtor, not exempt from execution, for the sum remaining unsatisfied.

In all actions of foreclosure, where there is a decree for the sale of the mortgaged premises or property, and a judgment over for any deficiency remaining unsatisfied after applying the proceeds of the sale of mortgaged property, further levy and sales upon other property of the judgment debtor may be made under the same execution. In such sales it shall only be necessary to advertise notice for two weeks in a newspaper published in the district or county where the said property is located, and if there be no newspaper published therein, then in the most convenient newspaper having a circulation in such county.

When sales of other property not embraced in the mortgage or decree of sale are made under the execution to satisfy any deficiency remaining due upon judgment, two weeks' publication of notice of such sale shall be sufficient. Such notice shall be published in a newspaper printed in the district or county where the property is situated, and if there be no newspaper published therein, then in the most convenient newspaper having a circulation in said district or county.

Judgments over for any deficiency remaining unsatisfied after application of the proceeds of sale of mortgaged property, either real or personal, shall be similar in all respects to other judgments for the recovery of money, and may be made a lien upon the property of a judgment debtor as other judgments, and the collection thereof enforced in the same manner.

¹ See 2 Jones on Mortgages, § 1363.

756. Wisconsin.¹—Mortgages of chattels are usually made with powers of sale. It would seem that such mortgages, when not containing such powers, might be foreclosed by action in the nature of a bill in equity.²

No sale of any personal property taken under or by virtue of any chattel mortgage, lease, or other instrument intended as security, except by consent of the mortgagor, his legal representatives and assigns, shall be made before the expiration of five days from the time when the same was actually taken, nor shall any such property during the time aforesaid be removed from the county where the same was situated when so taken; and during such period, such property shall be subject to redemption by payment of the mortgage debt, together with actual and necessary costs, and expenses of taking and keeping the property incurred at the time of making redemption.³

757. Wyoming Territory.⁴—Every mortgage, bond, or conveyance, containing and giving to the mortgagee or any other person a power to sell the property described therein, upon default being made in any condition of such mortgage or conveyance, may be foreclosed in the cases and in manner hereinafter specified. It shall be requisite: First. That some default in a condition of such mortgage or conveyance shall have occurred, by which the power to sell becomes operative. Second. That no suit or proceeding shall have been instituted at law to recover the

¹ The mortgagee upon default is invested with the entire right in the chattels, and may reduce them to possession. He is not bound to make a sale in order to perfect his claim. He is not bound to foreclose the mortgage by sale, although the mortgage contains a stipulation that he shall pay over to the mortgagor the proceeds of the sale after satisfying the mortgage debt. *Nichols v. Webster*, 1 Chand. 203; *S. C.* 2 Pinn. 234. If he sells under a power contained in the mortgage, he is accountable to the mortgagor for the surplus, whether the mortgage provide for the payment of such surplus or not. *Flanders v. Thomas*, 12 Wis. 410.

² *First Nat. Bank v. Damm*, 63 Wis. 249.

³ Laws 1887, ch. 294, § 1. In case of any violation of the provision of this act, the person aggrieved by such violation may recover of the person violating the same the sum of twenty-five dollars as liquidated damages, in addition to actual damages, in an action brought for that purpose in any court of competent jurisdiction. And in case of the sale of any such property by private sale without notice, or in case the same be sold within the period above limited, the mortgage debt shall be deemed paid, and the mortgage securing the same cancelled. *Ib.* § 2.

⁴ R. S. 1887, §§ 80-89.

debt then remaining secured by such mortgage or conveyance, or any part thereof, or if any suit or proceeding has been instituted that the same has been discontinued, or that an execution upon the judgment rendered thereon has been returned unsatisfied, in whole or in part. Third. That such mortgage or conveyance, containing the power of sale, has been duly recorded.

Notice that such mortgage or conveyance will be foreclosed by a sale of the mortgaged property, or some part thereof, shall be given by an advertisement, published in some weekly newspaper published in the county in which such sale shall take place, for three times in three consecutive issues of such paper, or, in case no weekly newspaper is published in said county, by posting up notices in at least three public places in said county, one of which shall be at the place designated in said notices for the sale to take place, and such notices shall be posted at least three weeks prior to the day of sale. Every such notice shall specify: First. The date of the mortgage or conveyance, and the date when and place where the same was recorded. Second. The names of the mortgagor and mortgagee, and the assignee of the mortgage, if any. Third. The amount claimed to be due thereon at the time of the first publication or posting of such notice. Fourth. A description of the mortgaged property, conforming substantially with that contained in the mortgage. Fifth. The time and place of sale.

Such sale may be postponed from time to time by inserting a notice of such postponement as soon as practicable in the newspaper in which the original notice was published, and continuing such publication until the time to which the sale shall have been postponed; or, in case no newspaper is published in the county in which such sale is to be had, by posting notices of such adjournment in the same manner and at the same places as the original notices were posted. Such sale shall be at public auction in the daytime, between the hours of ten A. M. and four P. M., in the county where the mortgage was first recorded, or in any county to which the property may have been removed by consent of the parties, and in which the mortgage was duly recorded.¹

¹ When the property so to be sold consists of neat cattle, horses, mules, sheep, or other live stock; or of any herd or part of any herd of neat cattle, horses, mules, sheep, or other live stock; or of any brand or mark by which the same shall be known, designated, marked, or branded; or of possessory claims to public lands and build-

The mortgagee, his assignees, and his or their legal representatives, may fairly and in good faith purchase any of the mortgaged property offered at such sale.

All mortgages, or instruments intended to operate as mortgages of personal property, so given and recorded, shall be deemed and held to contain an implied covenant, unless the contrary is therein expressed, by the mortgagor to pay the debt or obligation and interest specified in such mortgage, bond, conveyance, or instrument intended to operate as a mortgage; and when such mortgage, bond, conveyance, or instrument intended to operate as a mortgage shall have been foreclosed, all equity of redemption which the mortgagor may or might have had shall be and become extinguished; and in case any deficiency remain after such sale, such mortgagor may be held liable in an action at law for such deficiency.

ings, fences, ranches, and improvements thereon; or of any quartz, coal, or other mining claims,—such sale may take place at the court-house in the county where such mortgage, bond, conveyance, or instrument intended to operate as a mortgage was first recorded; or in case that the property to be sold has been removed to some other county, by the consent of the parties as hereinbefore provided, then

such sale may be had and take place at the court-house in the county to which such property has been removed, and where such mortgage, bond, conveyance, or instrument intended to operate as a mortgage has been duly recorded as hereinbefore required. In all other cases the sale shall take place in view of said property. R. S. 1887, § 87.

CHAPTER XVIII.

FORECLOSURE IN EQUITY AND SALES UNDER POWERS.

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| <p>I. Personal remedy upon the mortgage debt, 758-765.</p> <p>II. When the right to foreclose arises, 766-770.</p> <p>III. When the right to foreclose is barred, 771, 772.</p> <p>IV. Sale of the mortgaged property by</p> | <p>the mortgagee without formal foreclosure, 773-775.</p> <p>V. Foreclosure by suit in equity, 776-788.</p> <p>VI. Power of sale mortgages and trust deeds, 789-821.</p> |
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I. Personal Remedy upon the Mortgage Debt.

758. A mortgagee of chattels may pursue all his remedies concurrently.¹ He has the same right that a mortgagee of real property has to pursue all his remedies at the same time. He may maintain a suit at law to recover the mortgage debt, and also a suit at law to recover possession of the mortgaged property, and at the same time proceedings under a statute or in equity to foreclose the mortgage.² In the absence of any controlling statute, the foreclosure of a chattel mortgage is inherently a matter of equity jurisdiction.³

The rule is the same although the result of the statutory proceedings for the foreclosure of such a mortgage is the establishment of a special lien against the specific property, and the issuing of an execution to sell it; while the result of an ordinary action

¹ See 2 Jones on Mortgages, §§ 1215-1219.

² *Burtis v. Bradford*, 122 Mass. 129; *Pettibone v. Stevens*, 15 Conn. 19; *Thurber v. Jewett*, 3 Mich. 295; *Johnson v. Murphy*, 17 Tex. 216; *Satterwhite v. Kennedy*, 3 Strobb. (S. C.) 457; *Downing v. Palmateer*, 1 Mon. (Ky.) 64; *Juchter v. Boehm*, 63 Ga. 71; *Tyson v. Weber*, 81 Ala. 470.

But if the mortgagee is pursuing two of these remedies concurrently, such as an

action at law to recover the property, and a bill in equity to foreclose the mortgage, each must be governed by the rules of law applicable to the forum in which it is brought. He cannot in his suit at law to recover the property invoke the aid of a court of equity to prohibit the mortgagor from defeating such suit by a legal defence on legal principles. *Tyson v. Weber*, *supra*.

³ *McCormick v. Hartley*, 107 Ind. 248, 253.

upon the debt is a general judgment, which, by statute, is a general lien upon all the debtor's property, and which is enforced by execution against all the debtor's goods and chattels and lands. The mortgagee is entitled to this special lien, and to the general lien as well.¹

A creditor may hold any number of collaterals, and so long as the debt is unpaid he may avail himself of any or all of them.²

A mortgagee may pursue his remedy upon the mortgage at law and in equity at the same time. The pendency of a bill to foreclose a mortgage is no bar to an action of replevin or detinue for the property, or to trover for a conversion of it.³

Under a mortgage which provides not only for the reimbursement of the expenses of foreclosure, but also those incurred by the mortgagee in obtaining possession of the property, he is entitled to be reimbursed all necessary expenditures made by him to regain possession by replevin.⁴

But without the aid of such a provision, if the mortgagee first brings a suit at law upon the mortgage debt and afterwards forecloses in equity, the costs of the suit at law become a part of the mortgage debt.⁵ So if the mortgagor brings a suit to restrain the mortgagee from foreclosing, and judgment is rendered for the defendant in such suit upon his answer, treating this as a suit to foreclose and determine the amount due on the mortgage debt, the costs become a lien upon the mortgaged property, as in ordinary cases of foreclosure.⁶

759. The mortgagee may enforce the personal obligation of the debtor, although the mortgage security prove to be defeated by a title paramount; or if the mortgage prove to be fraud-

¹ *Juchter v. Boehm*, 63 Ga. 71. "Every creditor is entitled to obtain this general lien as soon as he can after his debtor puts himself in default. Why should he be postponed because he has also a special lien upon specific property, and is attempting to enforce it? If the debtor wishes to confine his creditor to one remedy, let him give but one security; let him decline to make a mortgage. In some states, I believe, a foreclosure suit results in a general judgment as well as the enforcement of the mortgage lien. Where that is the

case a separate action on the notes would be superfluous, and might well be disallowed when the foreclosure proceedings are already in progress."

² *Ayres v. Wattson*, 57 Pa. St. 360; *Chapman v. Clough*, 6 Vt. 123.

³ *Jones v. Henry*, 3 Litt. (Ky.) 47; *Ambler v. Warwick*, 1 Leigh (Va.), 195; *Lorch v. Aultman*, 75 Ind. 162.

⁴ *Morris v. Tillson*, 81 Ill. 607, 621.

⁵ *Pettibone v. Stevens*, 15 Conn. 19.

⁶ *Riemer v. Schlitz*, 49 Wis. 273; *S. C.* 5 N. W. Rep. 493.

ulent as to creditors, and be set aside by the mortgagor's assignee in insolvency.¹

But if there be no separate obligation, and no covenant or agreement in the mortgage to pay the sum secured, and no recital or declaration of indebtedness from the mortgagor to the mortgagee, there is no personal liability, and no action will lie by the mortgagee upon the mortgage to recover the debt secured.²

760. That a mortgage is fraudulent and void as against creditors does not affect the right of the mortgagee to enforce it against the mortgagor. A debtor having made such a mortgage of his household furniture went into bankruptcy, and a part of the furniture, exempt by law from being taken by his creditors, was separated from the rest by an agreement to which the mortgagee was a party, and duly set off to the bankrupt by the assignee. The mortgage having been decreed invalid as against the creditors, the rest of the furniture was disposed of by the assignee. The mortgagee, not having waived his mortgage by proving his debt in the bankruptcy proceedings, was held to be entitled to the furniture set off to the debtor.³

761. An acknowledgment of indebtedness in a mortgage is sufficient to sustain an action for the mortgage debt, and the creditor is not bound in the first instance to resort to the mortgage security.⁴ The acceptance of a mortgage of chattels to secure the purchase money of the same does not destroy the right of action to recover the purchase money, and it is immaterial that no note or other personal obligation was taken for the price.⁵ But an action of debt will not lie to recover a sum of money secured by a chattel mortgage, unless the instrument contains an express agreement to pay the sum, or a distinct acknowledgment of an existing debt. Thus, if there be no express covenant to pay the money, and no acknowledgment except that the instrument is executed for the purpose of securing the payment of a certain sum, although there be a proviso that the instrument

¹ *Whitney v. Willard*, 13 Gray (Mass.), 203.

As to personal remedies before and after foreclosure, see 2 Jones on Mortgages, §§ 1220-1228.

² *Weed v. Covill*, 14 Barb. (N. Y.) 242.

³ *Tuesley v. Robinson*, 103 Mass. 558.

⁴ *Elder v. Rouse*, 15 Wend. (N. Y.) 218.

⁵ *Sterling v. Rogers*, 25 Wend. (N. Y.) 658.

should cease and be void on payment of that sum, and in case of default the mortgagee is authorized to sell the goods and apply the proceeds in payment, rendering the overplus to the mortgagor, no action of debt will lie upon the instrument.¹

To enforce either the personal obligation or the mortgage lien the debt must be proved, and the mortgagee can recover only to the extent of the debt he makes proof of. If the debt be evidenced by a note or other written obligation, this should be produced. In an action upon the mortgage the identity of the debt secured with that described in the mortgage may be apparent from the description; but if not apparent, it may be established by parol evidence. "If the items which make up the debt are particularly described in the mortgage, it may save trouble in establishing the facts; but if there has been no fraud, and subsequent creditors have not been injured by the omission of specifications, identity may be established by parol. In making the proof, the debt must come fairly within the general description which has been given; but if it does, and the identity is satisfactorily made out, the mortgage will be sustained where good faith exists."²

762. A mortgagee may release his security by mortgage without affecting his personal claim for the debt. Where a partnership has been dissolved, and a new firm has agreed with retiring members to assume the partnership debts, and has accordingly secured a creditor by mortgage, the mortgagee may, with the assent of the retiring partners, release the mortgage without impairing his rights against all the members of the old firm, although he had notice of the agreement of the new firm to assume the debts of the old, and his mortgage was ample security for the debt to him.³

763. It is competent for a mortgagee to absolve his debtor from personal obligation, and agree to have recourse to the security alone for payment.⁴

But a waiver of the mortgage security is not necessarily or

¹ *Culver v. Sisson*, 3 N. Y. 264; *Larmon v. Carpenter*, 70 Ill. 549.

² *Wood v. Weimar*, 104 U. S. 786, 793, per Waite, C. J.

³ *Rawson v. Taylor*, 30 Ohio St. 389.

⁴ *Ball v. Wyeth*, 99 Mass. 338.

usually a waiver of the debt secured. A mortgagee is not, in the absence of fraud, precluded from recovering upon the mortgage debt, because he permits the property to be sold upon an inferior claim or lien.¹

764. A mortgagee is not confined to the special security taken, but, in the absence of any agreement to the contrary, may attach or levy execution upon other property of the debtor.²

If, however, a mortgagee attach the mortgaged property, he waives his claim under the mortgage; but he can make such attachment without violating any rights of the mortgagor.³ He may make such attachment even after he has taken possession of the property by virtue of his mortgage.⁴ And so if the mortgagee causes the mortgaged goods to be sold upon execution he will be considered as having abandoned his mortgage.⁵ If, however, he himself purchase the mortgaged property upon such execution sale, he will generally be considered as holding the property under the mortgage, and subject to redemption.⁶

765. A mortgagee is under no obligation to resort to a surety upon the mortgage note; and if the surety has also given a mortgage of his property as additional security, no obligation is imposed upon the mortgagee to resort to the surety or his mortgage for the relief of the general creditors of the principal debtor.⁷

II. *When the Right to foreclose arises.*

766. The right to foreclose usually arises upon the breach of any one of the conditions named in the mortgage, whether the condition be to pay the principal sum secured, or interest upon it, or to keep the property insured, or to do any other act.⁸ Of course the right might by express provision be made to arise only

¹ Jones v. Turk, 33 Iowa, 246.

⁵ Kimball v. Marshall, 8 N. H. 291;

² Cornwall v. Gould, 4 Pick. (Mass.) 444; Beckwith v. Sibley, 11 Ib. 482; Whitwell v. Brigham, 19 Ib. 117; Taylor v. Cheever, 6 Gray, 146.

Swett v. Brown, 5 Pick. (Mass.) 178.

⁶ Dabney v. Green, 4 Hen. & M. (Va.) 101.

⁷ Thompson v. Spittle, 102 Mass. 207.

⁸ Buck v. Ingersoll, 11 Met. (Mass.) 226; Whitney v. Farrar, 51 Me. 418. See § 565.

⁸ Leland v. Colver, 34 Mich. 418; Cassel v. Cassel, 26 Ind. 90; Clark v. Baker, 6 Mont. 153.

⁴ Libby v. Cushman, 29 Me. 429.

See, in general on this subject, 2 Jones on Mortgages, §§ 1174-1191.

upon a breach of all or any number of the covenants contained in the mortgage. Where covenants to keep up the stock and to insure it were united, and it was provided that "a breach of these two covenants shall cause the whole sum secured to become due and payable," but the defeasance expressly authorized a foreclosure on a breach of either, it was held, construing the mortgage as a whole, that a double breach was not essential to the right to foreclose.¹

767. But whether, upon a default in payment of a first instalment, the mortgagee can sell the entire property covered by the mortgage, is a different question, and one upon which there is a difference of opinion. In some states it is provided by statute that only so much of the mortgaged property shall be sold as shall be sufficient to satisfy the instalment upon which default has been made, in case the property is capable of division without injury; and the courts in some states enforce the same rule in the absence of any legislative enactment of it.

On the other hand, other courts allow a sale of the entire property upon a default in the payment of any instalment, though other instalments be not then due and payable; and powers of sale usually contain a provision authorizing the sale of the entire property upon any default.

Under a power in a mortgage of a vessel to secure the payment of a sum in instalments, "to take possession of and sell her in case the amount of the loan and interest, or any part thereof, shall remain due and unpaid after the time named for the payment thereof," the mortgagee may take possession of and sell her upon a failure to pay the first instalment, and may apply the proceeds of the sale so made towards the whole of the debt, including that which has not become payable at the time of the sale.² No action for conversion would lie against a mortgagee in such case, although on taking possession he made no claim to take the vessel under the mortgage, but said that he took her to prevent the owner running off, and although the sale was not in accordance with the mortgage deed. By the terms of the mortgage, the mortgagee having the right to take possession of the vessel, he cannot be charged as for a wrongful conversion of it while the mortgage remains unredeemed.³

¹ Leland v. Collyer, 34 Mich. 418.

³ Murray v. Erskine, *supra*.

² Murray v. Erskine, 109 Mass. 597.

768. The prevailing rule is, that the mortgagee may sell the entire mortgaged property upon default in payment of the first instalment, whether the mortgage contains a special provision to this effect or not; for even when such sale is not specially provided for, the entire mortgaged property, though severable, may be sold upon the first default, because the mortgagee's title then becomes absolute. The right to take possession of the property and sell it, upon a default in payment of any part of the sum secured, follows as an incident to the relation of the parties.¹

When there has been a sale of the mortgaged property upon a breach of the condition of a mortgage in the payment of interest, or of one instalment of the principal debt, the mortgagee has the right to retain the proceeds to meet the instalments which have not matured.²

If the mortgage provides that the property may be sold upon any default, and the proceeds applied to the payment of interest and principal, this is equivalent to a provision that, upon default in the payment of interest, the principal shall become due and payable.³

But it is optional with a mortgagee to take possession upon default in payment of a first instalment, or to await the maturity of the entire debt. A provision in the mortgage authorizing the mortgagee to take possession upon any default imposes no obligation to do so.⁴

769. But an exceptional rule in this respect prevails in Michigan, for in that state a chattel mortgage is only a security, and the mortgagee has no absolute title upon default. Upon default in payment of a first instalment of a debt, the mortgagee can take possession of all the mortgaged property and sell enough to pay the amount due with interest and costs; but if the property be such that it may be divided without injury, the mortgagee can sell only so much as may be necessary to make good the instalment then due. By statute in this state the entire property may be sold upon a default under a real estate mortgage, and

¹ *Bragelman v. Daue*, 69 N. Y. 69; *McConnell v. Scott*, 67 Ill. 274.

² *Flanders v. Barstow*, 18 Me. 357.

³ *Clark v. Baker*, 6 Mont. 153.

⁴ *Chapin v. Whitsett*, 3 Col. 315; *Barbour v. White*, 37 Ill. 164; *Cleaves v. Herbert*, 61 Ill. 126.

the proceeds may be applied to the instalments not then due ; but there is no such statute applicable to chattel mortgages ; and there is no way of doing this upon a sale of mortgaged chattels for default in one instalment of the debt, however advantageous this course might be to either or both the parties, unless they have in the mortgage or otherwise agreed that this may be done.¹

770. A mortgage which specifies no time of payment is due immediately, and may be foreclosed without a previous demand of payment.² A mortgage given to secure a note payable on demand is payable immediately, and may be foreclosed without a previous demand ; and parol evidence is not admissible to show that the mortgage and note were given as collateral security, to indemnify the mortgagee against certain liabilities for the mortgagor, which had not matured when notice to foreclose was given.³ A foreclosure suit is a sufficient demand of payment ; and so is a notice of intention to foreclose the mortgage given in pursuance of a statute which provides for a foreclosure by means of such notice and the lapse of a certain time thereafter.⁴

If a mortgage be given to secure a performance of any act or contract other than the payment of money, and no time of performance is specified, the omission does not vitiate the contract, but the law will require the performance of it within a reasonable time.⁵

A provision in a trust deed, that upon default, or as soon thereafter as requested by the *cestui que trust*, the trustee shall sell the property, does not have the effect of postponing the law day named in the deed until such request be made, but the trustee after such default may sell at his discretion.⁶

III. *When the Right to foreclose is barred.*

771. Statutes of limitation are strictly applicable only to proceedings at law, yet by analogy they are adopted in courts of equity as fixing the time within which rights may be there

¹ *Brink v. Freoff*, 40 Mich. 610 ; *S. C.* again before the court, 44 Mich. 69 ; *S. C.* 6 N. W. Rep. 94.

² *Dikeman v. Puckhafer*, 1 Abb. (N. Y.) Pr. N. S. 32 ; *Howland v. Willett*, 3 Sandf. (N. Y.) 607 ; *Farrell v. Bean*, 10 Md. 217 ; *Bearss v. Preston* (Mich.), 32 N. W. Rep. 912.

³ *Southwick v. Hapgood*, 10 Cush. (Mass.) 119.

⁴ *Goodrich v. Willard*, 2 Gray (Mass.) 203.

⁵ *Byram v. Gordon*, 11 Mich. 531.

⁶ *Brock v. Headen*, 13 Ala. 370.

enforced.¹ Following this analogy, the right of a mortgagee to foreclose a mortgage of real property is presumed to be barred after the lapse of such a period as is prescribed for enforcing a right of entry upon lands. Following the same analogy, the right to foreclose a chattel mortgage is barred after the lapse of the period within which an action at law may be brought for the possession of the property.²

In North Carolina it is presumed that a mortgagee of chattels has abandoned the right to foreclose his mortgage when he has permitted the mortgagor to remain in possession more than ten years without making any payment of interest or of principal.³

In Kentucky an action upon a mortgage is barred when the debt secured is barred. A mortgage executed to secure an account without any covenant to pay it is a mere incident to the demand, and cannot stand upon the footing of a written obligation to pay a debt. An action upon it is therefore barred in five years, the time limited for bringing an action upon the account.⁴

772. The statute of limitations does not begin to run against a mortgagee until a forfeiture has occurred. If, for instance, a mortgagor has, by the terms of the mortgage, his whole lifetime within which to pay the debt, the mortgage does not become forfeited until the mortgagor's death, and the statute does not begin to run against the mortgagee until that time.⁵ But the fact that the mortgage contains a provision that the mortgagor may remain in possession until the debt is paid, and this is payable at a fixed time, does not exempt the mortgage from the operation of the statute of limitations, but this will begin to run from the time of the forfeiture.⁶

But as a general rule, the statute of limitations does not begin to run against a mortgage upon a breach of the condition, though the mortgagor remains in possession of the property, provided such possession is with the mortgagee's consent. It does not begin to run until the mortgagor's possession becomes openly adverse to the rights of the mortgagee. So long as the mortgagor's possession is permissive and with the consent of the mortgagee, so

¹ 2 Jones on Mortgages, § 1192.

² *Ewell v. Tidwell*, 20 Ark. 136; *Sullivan v. Hadley*, 16 Ark. 129.

³ *Blake v. Lane*, 5 Jones (N. C.) Eq. 412.

⁴ *Prewitt v. Wortham*, 79 Ky. 287.

⁵ *Joyner v. Vincent*, 4 Dev. & B. (N. C.) 512.

⁶ *Byrd v. McDaniel*, 33 Ala. 18.

understood and acted upon by both parties, it cannot ripen into an adverse title. It does not begin to run until the mortgagee has demanded and been refused possession.¹

Although the debt secured has become barred by the statute, the remedy upon the mortgage is not necessarily barred; but this continues until a suit or bill as to the property is barred under the statute applicable to that.²

IV. *Sale of the Mortgaged Property by the Mortgagee without Formal Foreclosure.*

773. A mortgagee is not bound to foreclose his mortgage in any way. He may, as has already been noticed,³ after acquiring the absolute title to the mortgaged chattels by forfeiture and taking possession of them, retain the property; and if the mortgagor has any right to redeem he must assert it in equity.⁴ The mortgagee's taking and retaining possession in such case constitutes payment of the mortgage debt.⁵ If the property be of insufficient value to satisfy the debt, and he desires to recover a deficiency, he must sell the property either under foreclosure proceedings or by virtue of a power in the mortgage, or possibly by private sale at a fair price.⁶ And, on the other hand, if the property be of greater value than the amount of the mortgage debt, and the mortgagee retain the property without sale, the mortgagor has no legal claim for the excess of such value.⁷

The mortgagee, after taking possession, must sell the property by virtue of his title, or under foreclosure proceedings, within a

¹ McGowan v. Reid (S. C.), 3 S. E. Rep. 337; Smith v. Woolfolk, 5 Sup. Ct. Rep. 1177; Lewis v. Schwenn (Mo.), 2 S. W. Rep. 391; Mertens v. Kielmann, 79 Mo. 412.

² Almy v. Wilbur, 2 Wood. & M. 371; Crain v. Paine, 4 Cush. (Mass.) 483; Hudson v. Wilkinson, 61 Tex. 606; Nichols v. Briggs, 18 S. C. 473; McGowan v. Reid, *supra*; Clough v. Rowe (N. H.), 3 Atl. Rep. 314; Earnshaw v. Stewart (Md.), 2 Ib. 734; Fievel v. Zuber (Tex.), 3 S. W. Rep. 273; Conner v. How (Minn.), 29 N. W. Rep. 314; Cheney v. Janssen (Neb.), Ib. 289. See 2 Jones on Mortgages, § 1204, and Jones on Pledges, § 581.

³ See § 707.

⁴ Olcott v. Tioga R. R. Co. 40 Barb. (N. Y.) 179; Hulsen v. Walter, 34 How. (N. Y.) Pr. 385; Warwick v. Hutchinson, 45 N. J. L. 61; Freeman v. Freeman, 17 N. J. Eq. 44; Bradley v. Redmond, 42 Iowa, 452; Sheppard v. Earles, 13 Hun (N. Y.), 651.

⁵ Case v. Boughton, 11 Wend. (N. Y.) 106; Stoddard v. Denison, 38 How. (N. Y.) Pr. 296; S. C. 7 Abb. Pr. N. S. 309; Freeman v. Freeman, *supra*; *In re Haake*, 2 Sawyer, 231; S. C. 7 N. Bank. R. 61.

⁶ Landon v. White, 101 Ind. 249.

⁷ Olcott v. Tioga R. R. Co. *supra*.

reasonable time, or he will be deemed to have taken the property to the extent of its value at that time in satisfaction of the debt;¹ and especially if the property be of a perishable nature, like a ship or a horse, it would seem that the mortgagee can have no right to retain it for an indefinite period after condition broken, and, when the property has diminished in value by use or age, sell it, and demand of the mortgagor payment of the deficiency.²

Even in Massachusetts, where a mode of foreclosure is prescribed by statute, a sale of the entire property by the mortgagee at private sale, although not authorized by any power in the mortgage, is not a conversion for which the mortgagor or any one claiming under him can maintain an action.³ A mortgagee has the legal title to the property, and also the right of possession, unless this is expressly or by necessary implication given to the mortgagor. Having title and possession, he necessarily has the right of disposal, subject only to the mortgagor's right of redemption, and the mortgagor, having neither the title nor the right of possession, cannot maintain any action at law for the recovery of the property or of its value.

774. The rule is otherwise where a chattel mortgage is regarded as giving the mortgagee a mere lien upon the property, and not as conferring a title upon him. A sale of the mortgaged property by him, after taking possession for condition broken, otherwise than by foreclosure sale, or without complying with all the requirements of the statute, is a conversion of the property.⁴ And so if the mortgagee, after condition broken,

¹ Quoted with approval in *Lee v. Fox*, 113 Ind. 98; 14 N. E. Rep. 889. See § 711.

² *In re Haake*, 2 Sawyer, 231.

³ *Landon v. Emmons*, 97 Mass. 37. In an earlier case (*Spaulding v. Barnes*, 4 Gray, 330), a decision apparently in conflict with the above decision was made. The reasons of the decision are not fully given; and the sale by the mortgagee, against whom the mortgagor was allowed to maintain an action in the nature of trover, was of a part only of the mortgaged property, which might, perhaps, be held to be inconsistent with the mortgagor's rights of redemption. In *Landon*

v. Emmons the court say: "Whether a sale by the mortgagee of part only of the mortgaged property would amount to a conversion, give the mortgagor an immediate right of possession, and enable him to maintain an action in the nature of trover, is a question which does not arise in the present case. It is sufficient to say that such an action by the mortgagor, because of a sale of the entire property by a mortgagee who is entitled to the possession, cannot be supported consistently with the authorities already cited, or with principle."

⁴ *Loeb v. Milner*, 21 Neb. 392.

takes possession of a part of the property, and, retaining the same, assigns the mortgage to a third person, it is said that he may well be held to have converted the same to his own use, and that the value of it should be applied in payment of the mortgage. A mere taking possession of the property alone would not have this effect, as the mortgagee has a right to take and retain possession for the purpose of making sale of the property in accordance with the terms of the mortgage.¹

775. A sale of the mortgaged property after foreclosure by consent of the parties is equivalent to a formal foreclosure of the equity of redemption, and neither the mortgagor nor any creditor of his having no lien upon the property can assail the title of the purchaser.²

The mortgage lien is waived by an agreement between several mortgagees and the mortgagor, that the mortgaged property with other property should be sold at auction, and that the proceeds should be applied in a certain way to the payment of the mortgage debts. For the purposes of the sale, the mortgage security upon the property is waived, and the purchaser takes a good title free from the mortgage liens. There is sufficient consideration to support the agreement on the part of a prior mortgagee in the necessary waiver of the mortgage security by the subsequent mortgagee. To permit the prior mortgagee afterwards to insist that there was no sufficient consideration to support his promise would work an injury to the subsequent mortgagee which would be a sufficient consideration for his promise.³

775 a. The parties may agree that the mortgagee may sell the property at private sale, although it be provided by statute that a sale under a chattel mortgage shall be made after public notice for a specified time; and such agreement may be made subsequent to the execution of the mortgage, as well as in the mortgage itself.⁴

¹ *Brong v. Brown*, 42 Mich. 119; *S. C.*
3 N. W. Rep. 291.

² *Bradshaw v. McLoughlin*, 39 Mich.
480.

³ *Talman v. Smith*, 39 Barb. (N. Y.)
390.

⁴ *Reynolds v. Smith*, 28 Kans. 810.

V. *Foreclosure by Suit in Equity.*

776. A bill in equity is the proper and ordinary mode of foreclosing a chattel mortgage, except in case some other mode is provided by statute.¹ The foreclosure of mortgages is one of the matters of which all courts having full equity powers, unrestricted by statute, have general jurisdiction. This jurisdiction is the same as regards chattel mortgages that it is in case of mortgages of real property. The form of the bill and the mode of proceeding is substantially the same, whether the subject matter of the mortgage be personal property or real estate.²

777. That the mortgage contains a power of sale does not preclude a foreclosure in equity.³ In a recent case in New York, where a foreclosure of a chattel mortgage by action is very unusual, the Court of Appeals asserted the right to proceed in equity for this purpose.⁴ "That an action in equity lies to foreclose a chattel mortgage," said Judge Andrews, "admits, we think, of no doubt. The remedy by sale under the power, without resort to judicial proceedings, is in most cases a more speedy and effectual means of extinguishing the equity of redemption, and has to a great extent superseded a resort to an action of fore-

¹ *Charter v. Stevens*, 3 Den. (N. Y.) 33; *Hall v. Bellows*, 11 N. J. Eq. 333; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Dupuy v. Gibson*, 36 Ill. 197; *Wylder v. Crane*, 53 Ill. 490; *Hammers v. Dole*, 61 Ill. 307; *Aldrich v. Goodell*, 75 Ill. 452; *Morris v. Tillson*, 81 Ill. 607; *Gaar v. Hurd*, 92 Ill. 315; *McCauley v. Rogers*, 104 Ill. 578; *Packard v. Kingman*, 11 Iowa, 219; *Broadhead v. McKay*, 46 Ind. 595; *Blakemore v. Taber*, 22 Ind. 466; *Brown v. Russell*, 105 Ind. 46; *Brown v. Greer*, 13 Ga. 285; *Clark v. Baker*, 6 Mont. 153.

² For those reasons, and because the author has quite fully treated of foreclosure by equitable suit in his treatise on Mortgages, §§ 1443-1450, he has deemed it unnecessary to treat of the subject here except in the briefest manner, merely to cite the cases which have arisen upon chattel mortgages.

³ *Packard v. Kingman*, *supra*; *Green v. Gaston*, 56 Miss. 748; *McDonald v. Vin-*

son, 56 Miss. 497. In this case Campbell, J., said: "It was settled that a power of sale in a mortgage or deed of trust does not in any way affect the jurisdiction of a court of chancery to enforce the rights of parties thereto, nor abridge in the slightest degree the right of a person secured by such instrument to resort to a court of chancery, as he might do if no such provision had been made for enforcing the security without the aid of a court. All the powers conferred by such an instrument are *additional* to what the law grants, and neither affect the jurisdiction of a court of chancery nor the option the holder has to invoke its jurisdiction as if the instrument contained no such provision. A power to sell, or to appoint a trustee, or the like, *enlarges* the right of the person to whom it is given, but does not *diminish* it."

⁴ *Briggs v. Oliver*, 68 N. Y. 336.

closure. But the right to foreclose by action has not been taken away. In case of a pledge, the right of a pledgee to come into equity to obtain a decree for the sale of the pledge exists, although a valid sale may be made without judicial action or decree. The same rule applies in respect to a mortgage of chattels." Neither does the fact that the mortgagee may sue at law for the recovery of the mortgaged property, preclude a foreclosure in equity.¹ The remedy at law is inadequate, because it can only settle the right of possession.²

778. A power of sale in a mortgage is a cumulative remedy, and does not in any way interfere with the mortgagee's right to take possession upon default, or before default, if the mortgage contain no clause expressly authorizing the mortgagor to retain possession until default.³

Under a statute which provides that when the parties have provided in the mortgage the manner in which it shall be foreclosed, it shall not be foreclosed otherwise,⁴ either party may insist that the foreclosure shall be in the manner provided; but the party insisting upon such foreclosure must comply with the mortgage stipulation on his own part. Therefore in a mortgage which provided that upon default the mortgagor should deliver the property to the mortgagee, who might sell the property according to the stipulations thereof, it was held, if the mortgagor insisted that the foreclosure should be in the manner stipulated, it was his duty, in the first place, to deliver possession to the mortgagee so as to enable him to sell it. The mortgagor could not refuse to give up the goods, and at the same time insist upon a sale under the power. Having refused to fulfil the agreement on his part, or having put it out of his power to fulfil it by transferring the property to another, the mortgagee may foreclose by a bill in equity.⁵

779. A bill in equity is proper in case of successive incumbrances, although the mortgage contain a power of sale, and

¹ *Marx v. Davis*, 56 Miss. 745; *Forepaugh v. Pryor* (Minn. 1882), 15 Rep. 113. *Forepaugh v. Pryor*, *supra*; *Lee v. Fox* (Ind.), 14 N. E. Rep. 889.

² *Long Dock Co. v. Mallery*, 12 N. J. Eq. 93. ³ Gen. Laws of Oregon, 1872, p. 688, ch. 39, § 2.

⁴ *Rich v. Milk*, 20 Barb. (N. Y.) 616; ⁵ *Jacobs v. McCalley*, 8 Oregon, 124.

although the bill alleges that all the mortgages and liens except that of the complainant are void; for such an allegation would necessarily compel the court to determine the validity of the different liens; and if this allegation should be proved, it would be inequitable then to dismiss the bill and remit the complainant to his remedy at law.¹

If there are successive liens or incumbrances, it is eminently proper and promotive of justice that the mortgage should be foreclosed in a court of equity, where the accounts of all the parties in interest can be readily adjusted, and the trust fund equitably distributed among all the claimants. But a bill in equity cannot be maintained in every case. If the amount due rests in simple computation, and there are no other claims or other mortgages or liens, it is not necessary to foreclose by suit in equity, as the remedy by notice and sale is sufficient, and therefore a court of equity might in such a case withhold its aid.²

Other reasons for resorting to equity instead of exercising the power of sale may exist; such, for instance, as the impossibility of giving the notices of sale prescribed by the mortgage, in consequence of a removal of the property or for other cause.³

It is a ground for maintaining a bill in equity, to foreclose a mortgage instead of selling under a power, that the mortgage secures sundry creditors whose shares or interests are not defined, and could only be ascertained by a court of equity.⁴

A junior mortgagee cannot have an injunction to restrain a foreclosure sale under a senior mortgage, on the ground that such chattels are not covered by such other mortgage; because the junior mortgagee has an adequate remedy without the interference of equity, inasmuch as he may pursue the chattels into whoso-

¹ *Hammers v. Dole*, 61 Ill. 307; *Odell v. Gallup*, 62 Iowa, 253; *Dillaway v. Butler*, 135 Mass. 479; *Leopold v. Silverman* (Mont.), 16 Pac. Rep. 580.

² *Dupuy v. Gibson*, 36 Ill. 197; *Hammers v. Dole*, *supra*; *Ricks v. Pinson*, 21 Tex. 507; *Hannah v. Carrington*, 18 Ark. 85; *Bryan v. Robert*, 1 Strobb. (S. C.) Eq. 334. In *Dupuy v. Gibson*, *supra*, Walker, C. J., said: "In such a case the mortgagor or any of the junior mortgagees might maintain a bill to settle the rights of all parties, and for a redemption.

And what reason can be assigned why a mortgagee whose debt is due may not maintain a bill to adjust all rights and to foreclose and have the property sold and the fund distributed, and thus cut off a redemption? Property thus situated seems in equity to be a trust fund, and it is certainly better for junior mortgagees to foreclose in this manner than by sale by the senior mortgagee."

³ *Sullivan v. Hadley*, 16 Ark. 129.

⁴ *Norton v. Ladd*, 22 Conn. 203.

ever hands they may pass by the sale, if this is ineffectual to foreclose the mortgage.¹

780. A mortgage to secure the payment of a debt in specific articles should be foreclosed in equity, because it cannot be foreclosed by sale under a power until the amount due under the mortgage has been liquidated. But if the mortgage itself provides that the mortgagee may upon sale retain a specified sum, the damages are liquidated, and the mortgage may be foreclosed by sale under the power.² And so if there have been mutual dealings between the parties, and several mortgages have been given, and the balance secured by mortgage is in dispute, a sale advertised under a power may be enjoined until the balance due the mortgagee is ascertained.³

781. Foreclosure in equity cannot be had in states where a statutory mode of foreclosure is provided, and where the courts have not general jurisdiction in equity, but their jurisdiction is created and limited by statute. Such is the case in Massachusetts. In case the mortgagee has an adequate and complete remedy by the statutory mode of procedure, he cannot resort to equity to foreclose his mortgage. Whether a bill to foreclose a chattel mortgage in any case can be sustained in Massachusetts is a question which the Supreme Court of the state, in a recent case, left undecided, because, in the case before the court, it was declared that the remedy furnished by the statute was adequate.⁴

782. Where the suit should be brought. — A suit to foreclose a chattel mortgage should be brought in a court having jurisdiction of the defendant.⁵ It is a transitory and not a local action, and it is immaterial where the property may be.

When the property is not within the jurisdiction of the court, but has been taken beyond such jurisdiction by another person who refuses to surrender it, the court may, instead of ordering a sale of the property, decree that the person in possession shall pay

¹ Rankin v. Rankin, 67 Iowa, 322.

⁴ Boston & Fairhaven Iron Works v.

² Jackson v. Turner, 7 Wend. (N. Y.) 458.

Montague, 108 Mass. 248.

⁵ Brown v. Greer, 13 Ga. 285.

³ Purnell v. Vaughan, 77 N. C. 268.

its value. This was done in a case where the mortgage was of a part interest in a portable engine, which the other joint owner had removed to another state for the purpose of defeating the rights of the mortgagee.¹

783. Parties to the bill.²—Every person secured by a mortgage should be made a party to a bill to foreclose it, although he be not one of the mortgagees.³ A person entitled to a part only of the mortgage money cannot file a bill to foreclose a mortgage as to his own part. Every beneficiary should be made a party as well as the trustee.⁴ But a mortgagor who has sold the chattel and has no further interest in it is not a necessary party.⁵

The mortgagor and every other person having an interest in the mortgaged property should be made defendants to the bill, so that their claims and equities in the property may be cut off.⁶ Junior mortgagees may be made parties to the suit upon their own application.⁷ A purchaser of the mortgaged property, or of any part of it, from the mortgagor, should be made a party defendant with the latter.⁸ Of course the personal representative of a deceased mortgagee should bring the bill,⁹ and the representatives of a deceased mortgagor should be made parties defendant.¹⁰

784. No demand by the mortgagee is necessary before bringing a bill to foreclose a mortgage, whether the property be in the possession of the mortgagor or of a purchaser from him.¹¹ Although a junior mortgagee be joined in the suit in order to compel him to account for a portion of the property which he had converted to his own use, no demand upon him for an accounting is necessary.¹²

784 a. Proof of the debt.—Either the petition or the evidence must show that the debt sued for is the debt described in

¹ *Gaar v. Hurd*, 92 Ill. 315.

⁷ *Parrott v. Hughes*, 10 Iowa, 459.

² See 2 Jones on Mortgages, §§ 1368-1442.

⁸ *Trittipo v. Edwards*, 35 Ind. 467.

³ *Chapman v. Hunt*, 14 N. J. Eq. 149.

419.

⁴ *Chapman v. Hunt*, *supra*.

¹⁰ *Binkley v. Forkner* (Ind.), 15 N. E.

⁵ *Farnsley v. Anderson Foundry, &c. Works*, 90 Ind. 120.

Rep. 343.

⁶ *Greither v. Alexander*, 15 Iowa, 470.

¹¹ *Zehner v. Aultman*, 74 Ind. 24.

¹² *Woodward v. Wilcox*, 27 Ind. 207.

the mortgage.¹ If the mortgage secures a negotiable note, the note must be produced upon the trial, or its absence satisfactorily accounted for.²

785. A personal decree against the mortgagor cannot be had unless prayed for in the bill; and if the mortgagee fail to establish his right against the property, his only remedy is by suit at law upon the mortgage debt.³

In an action to foreclose a mortgage and to obtain a personal judgment for the debt, a subsequent purchaser of the mortgaged property cannot avail himself of a demand in favor of the mortgagor against the mortgagee as a counter-claim.⁴

786. The measure of damages for the refusal of the mortgagor to surrender the property upon a decree to that effect, in a suit in equity to foreclose a mortgage, is the value of the property at the time of the failure to obey the decree. The damages are given in place of the specific property. In this respect the measure of damages is different from that given in an action of trover or trespass for the conversion of the mortgaged property; for the injury consists in the former case in not giving up the property when called for by the decree, while in the latter case it consists in unlawfully taking the property at some former time and not paying its value at that time.⁵

A decree foreclosing a chattel mortgage, so long as the property has not been seized or sold under it, does not affect the rights of third persons in the goods.⁶

787. The right to have a receiver of the property appointed pending a foreclosure suit arises under very much the same circumstances that authorize the appointment of a receiver in a suit to foreclose a mortgage of real property.⁷ The general rule is that a receiver may be appointed, although the mortgagee has the legal title and might enforce his possession at law, whenever

¹ *New v. Sailors* (Ind.), 16 N. E. Rep. 609.

² *Weems v. Coker*, 70 Ga. 746.

³ *Wylde v. Crane*, 53 Ill. 490.

⁴ *Beers v. Waterbury*, 8 Bosw. (N. Y.) 396.

⁵ *Fowler v. Merrill*, 11 How. 375; *Merrill v. Dawson*, Hemp. 563.

⁶ *Catlin v. Currier*, 1 Sawyer, 7.

⁷ 2 *Jones on Mortgages*, §§ 1516-1534; *Rose v. Bevan*, 10 Md. 466; *Clagett v. Salmon*, 5 G. & J. (Md.) 314; *Bayaud v. Fellows*, 28 Barb. (N. Y.) 451.

equitable grounds for such relief can be shown, among which are the inadequacy of property to secure the debt, the insolvency of the mortgagor, and danger that the property will be lost or materially injured. A receiver will not be appointed when the mortgaged chattels are adequate to meet the debt, especially if the mortgagor is willing to give a bond with good security for the forthcoming of the property to answer the decree.¹

788. Marshalling securities.² — On a bill to foreclose a prior mortgage of property upon a part of which there are subsequent mortgages, or when the first mortgagee holds other security, to which the subsequent mortgagees have no claim, the latter may insist upon the just and faithful application of such other security before resorting to the property which also secures the subsequent mortgagees.³ But if a person has any equities which entitle him to insist upon the application of other property to the payment of the mortgage debt in exoneration of the property which he holds, he must take seasonable measures to assert his equities before a sale of such property is made under the prior mortgage. If he fails to do this, and has no sufficient excuse for his failure, he cannot assert his claim after a fair sale has been made.⁴

¹ *Williams v. Noland*, 2 Tenn. Ch. 151. The mortgaged property in this case was an undivided interest in a number of horses, mules, and wagons.

A receiver in charge of the mortgaged property may contract with the mortgagor to release to him a certain part of the property mortgaged in payment for services rendered. It is presumed that he acts for the interest of the mortgagee. *Ayers v. Hawk* (N. J.), 11 Atl. Rep. 744.

A receiver appointed in a suit to foreclose a chattel mortgage may properly be ordered to sell horses claimed to be included in the mortgage as perishable property. *Howel v. Frances* (N. J.), 9 Atl. Rep. 379.

² See 2 Jones on Mortgages, §§ 1628, 1629.

³ *Pettibone v. Stevens*, 15 Conn. 19; *High v. Brown*, 46 Iowa, 259; *Lee v. Buck*, 13 S. C. 178; *S. C.* 10 Rep. 412; *Turner v. Flinn*, 67 Ala. 529; *Ayers v. Hawk*, *supra*.

In *Merchants' Nat. Bank v. McLaughlin*, 1 McCrary, 258, certain mules, including one named Kit, were mortgaged to A. The mortgagor afterwards sold Kit to B., and after such sale he mortgaged to C. all of the mules included in the first mortgage except Kit. After default, A. and C., acting in concert, seized all of these mules, and sold and appropriated them; A., realizing more than enough to satisfy his mortgage, paid over the surplus to C. In an action by B. against A. to recover the value of Kit to the extent of such surplus, it was held that A. was bound to exhaust the proceeds of the mules other than Kit before he could subject Kit, which had been sold, to the payment of his debt; and that A. was liable to account to B. for the value of Kit out of the surplus which he paid to C.

When the rule applicable and when not. *Knight v. Rountree* (N. C.), 6 S. E. Rep. 762.

⁴ *Richards v. Spicer*, 23 Minn. 212. And see *Johnson v. Williams*, 4 Minn. 260.

But the mortgagee, after condition broken, is entitled to the possession of the entire mortgaged property, though a part of it is covered by a junior mortgage, and though he has also other security, or has relinquished his lien on a part of the property not embraced in the junior mortgage.¹

VI. *Power of Sale Mortgages and Trust Deeds.*

789. General statement.—In most parts of the country it is usual to provide for a sale of mortgaged chattels by a power in the mortgage authorizing the mortgagee to sell upon default in the manner provided in the instrument; or else to provide for a similar power in a third person, in which case the instrument is called a deed of trust. In many states this form of mortgage is used almost exclusively; and everywhere this form seems to be more generally used for mortgages of personal property than for mortgages of real estate.²

Statutory provisions regulating foreclosure sales of mortgaged chattels upon default do not exclude sales under powers with reasonable stipulations agreed upon by the parties, unless the statutory provisions are expressly made exclusive.³

¹ *Norris v. Hix* (Iowa), 38 N. W. Rep. 395.

² See 2 Jones on Mortgages, §§ 1722–1940, where the subject of powers of sale in mortgages of real property are fully treated.

³ *Denny v. Van Dusen*, 27 Kans. 437, 440. “The contract is valid; there is no statute forbidding it; it is not against public policy, and would oftentimes increase the value of the mortgaged property to the mortgagor as security, without in any manner prejudicing any substantial rights. Why should not the owner of personal property, who may sell absolutely or conditionally, and impose such conditions as the parties may agree upon, or give it away, providing it be not done in fraud of creditors, — why should not such owner be permitted to mortgage his property upon such conditions as he sees fit? Freedom in commercial transactions is always to be encouraged, providing only that such

freedom does not trespass upon any statute, do any wrong to the public, or work any injustice to the parties. It would often be of great value to the mortgagor if he could insert a valid stipulation that the mortgaged property, when taken possession of by the mortgagee, should be sold in a certain market, or at a certain time, or upon certain conditions. To deprive him of such right would render his property less valuable for the purpose of security, and perhaps prevent him from obtaining such a loan as his necessities require. If the mortgagee carries out in good faith the terms of the agreement, and makes the very disposition which he has contracted to make, he has broken no contract, he has been guilty of no bad faith to the mortgagor, and ought to be chargeable with only the actual proceeds of the property thus disposed of by him.” Per Brewer, J.

790. Under a power in the mortgagee to sell at public or private sale, he is not bound to give the mortgagor personal notice of the sale, or even to demand payment of the debt, before selling at private sale. Upon proof that the sale was fairly made, he may recover of the mortgagor the remainder of the debt due after applying the proceeds of sale.¹

791. A private sale, when authorized by the mortgage, is effectual in foreclosing the mortgagor's equity of redemption. Thus under a mortgage containing a power to the mortgagee, in case of default, to take the property and "to sell the same," and apply the avails in payment of the debt; and in case he shall at any time deem himself unsafe, to take possession of the property previous to the day of payment, and "sell the same at public or private sale," the mortgagee may, in case of default in payment at the day, sell the property at private sale, without notice to the mortgagor, and such sale, if fairly made, forecloses the mortgagor's equity of redemption.² It was deemed that no distinction was intended as to the mode of sale whether the sale was made on default or before default.

792. If a power of sale does not require the giving of any notice of the sale, the mortgagee can make a valid sale either at public or private sale, and need not give any notice of it unless he choose so to do. But nevertheless the sale, to be binding, must be a fair one.³

793. A mortgagee may lawfully sell and transfer the mortgaged property at private sale after taking possession of it upon default, for he has then the absolute legal title.⁴ Under a power of sale which does not require notice of sale to be given, the mortgagee has the option to give notice or not, as he may choose, and he may sell at public or private sale; only, to make the sale bind-

¹ Huggans v. Fryer, 1 Lans. (N. Y.) 276; Ballou v. Cunningham, 60 Barb. (N. Y.) 425; Chamberlain v. Martin, 43 Ib. 607. See § 793.

² Chamberlain v. Martin, *supra*; Harris v. Lynn, 25 Kans. 281; §§ 707, 773. A like decision upon a similar mortgage was made in Ballou v. Cunningham, *su-*

pra. A dissenting opinion of Mullin, J., is printed in 4 Lans. 74. And see Huggans v. Fryer, *supra*.

³ Wylder v. Crane, 53 Ill. 490, 493.

⁴ McConnell v. People, 84 Ill. 583; Wylder v. Crane, *supra*; Waite v. Denison, 51 Ill. 319; Hungate v. Reynolds, 72 Ill. 425.

ing, it must be fair.¹ But he is, however, liable to the mortgagor for any injury sustained by him through the omission of the mortgagee to comply with the terms of a power of sale contained in the mortgage. The mortgagor cannot recover the property by reason of the mortgagee's failure to comply with the terms of the power; as where the latter sells without advertising, under a power authorizing him to take possession, advertise, and sell. In an action to recover the property, the mortgagor must rely upon the strength of his own title, and not on the weakness of that of his adversary. The mortgagee having the right to take possession, this cannot be taken from him so long as the debt remains unpaid. The proper remedy of the mortgagor is a bill to redeem.²

If, however, the mortgagee disregards the method of sale prescribed by the terms of a power of sale, and sells a part of the mortgaged goods at private sale, in an action upon the mortgage debt the mortgagor is entitled to be credited with the market value of such goods to be ascertained by the jury.³

794. A power of sale confers no right to barter or exchange the mortgaged property for other property. It necessarily implies a contract to be made by the holder of the mortgage to pass the property for money, or for a promise to pay money, if the seller be willing to take the risk of giving credit. The mortgagor is entitled to the excess of the proceeds of the sale over the amount of the debt secured, and he cannot be compelled to take this in anything but money. He is, moreover, entitled to a sale for money, so that he may know whether there be any surplus.⁴

A mortgagee holding property with power to sell or manufacture is liable for any loss which may occur through his exceeding the power conferred upon him, unless the mortgagor subsequently ratify his unauthorized acts.⁵

¹ Wylder v. Crane, 53 Ill. 490, 493; Campbell v. Wheeler, 69 Iowa, 588. See § 790.

² Whitaker v. Sigler, 44 Iowa, 419.

³ Botsford v. Murphy, 47 Mich. 537.

⁴ Edwards v. Cottrell, 43 Iowa, 194. "Sale," said Mr. Justice Wayne, in Williamson v. Berry, 8 How. 495, 544, "is a

word of precise legal import in law and in equity. It means at all times a contract between parties to pass rights of property for money which the buyer pays or promises to pay to the seller, for the thing bought and sold." Followed in Bigley v. Risher, 63 Pa. St. 152.

⁵ Beckley v. Munsen, 22 Conn. 299.

795. The notice provided for by the mortgage must be given in the manner and for the length of time therein specified.¹ Where a mortgage provided for a sale at public auction to the highest bidder, after giving ten days' notice of the time, place, and terms of sale, with a description of the property, or that the mortgagee might sell at private sale, and notice was given for "Monday, Nov. 25th, at 10 o'clock, at 46, 48 & 50 Dearborn Street, opposite Tremont House," it was held that the notice was sufficient in respect to the time of sale, notwithstanding it omitted to state the year in which it would be made. Having been given in the early part of the month of November, all persons seeing it would infer that the sale would take place on the 25th of the same month.²

The omission to state in the notice of sale whose property is to be sold will not invalidate the sale.³ The omission to give the date and amount of the mortgage, or the names of the mortgagor and mortgagee, the property, its location, and the time and place of sale being properly described, the mortgage being filed in the proper office, and there being no other mortgage upon the property, does not invalidate the sale.⁴

If the mortgage provides that the sale shall be made in a town or county named, the notice must be of a sale to be made in such town or county, unless by agreement of the parties the sale is to be made elsewhere; but if by agreement the sale is made elsewhere, a creditor of the mortgagor cannot object to the change in the absence of proof of collusion and fraud.⁵

Under a power authorizing the mortgagee, his agent, attorney, or assignees, to execute the power of sale, the sale may be advertised and made by an agent.⁶

A mortgagor who has actively engaged in promoting a foreclosure sale under a chattel mortgage, without objecting to the proceedings, is estopped from saying, after the sale, that some of the mortgaged articles were not legally advertised.⁷

A mortgagor waives a requirement that the sale be after notice given, at a certain place in a certain manner, by requesting that

¹ Campbell v. Wheeler, 69 Iowa, 588. See 2 Jones on Mortgages, §§ 1821-1856.

⁴ Manwaring v. Jenison, 61 Mich. 117, 143.

² Waite v. Dennison, 51 Ill. 319. See, also, Finch v. Sink, 46 Ill. 169.

⁵ Tootle v. Taylor, 64 Iowa, 629.

⁶ Waite v. Dennison, *supra*.

³ McConnell v. Scott, 67 Ill. 273; Waite v. Dennison, *supra*.

⁷ Lucy v. Gray, 61 N. H. 151.

the property be taken to another place for sale. A sale fairly made at the latter place after a reasonable notice is valid.¹

796. Conduct of sale. — It is no objection to a sale of such property as books that other books belonging to other persons are put upon the catalogue and sold with the books named in the mortgage. It works no injury to the mortgagor.²

If the power of sale be general and unrestricted as to the time and place of sale, these may be fixed by the mortgagee at his discretion, subject only to the general rule that he shall conduct the sale in general fairness towards the mortgagor. It is not necessary that the property should be at the place of sale, especially if this be of a ponderous nature, and it be located where it could be readily inspected by any one who wished to do so.³

A power to sell given to a mortgagee, involving the exercise of judgment and discretion, cannot generally be delegated by him to an agent; though there may be exceptions implied from commercial customs or from usages at the place where the sale is made.⁴

797. Sale in parcels. — If the property consists of many different articles, which can easily be offered for sale separately, or in lots or parcels suited to the convenience of bidders, a sale of the whole in a lump might properly be regarded as an unfair mode of sale;⁵ especially if it were shown that a larger sum would probably have been obtained from a sale in parcels. A sale of ten horses in one lot, when there are persons present at the sale who wish to buy a part of them, is irregular, and makes a mortgagee who sells in this way under a power liable for the sum which the horses would have brought if sold separately.⁶

Where a mortgage was made of a growing crop of wheat, which the mortgagor afterwards harvested and stored in his granary, and the holder of the mortgage afterwards seized and sold a much larger quantity of wheat than was sufficient to satisfy his mortgage, and it appeared that he did this for the purpose of converting the property into money and of applying this to the payment

¹ Darnall v. Darlington (S. C.), 5 S. E. Rep. 620.

² Waite v. Dennison, 51 Ill. 319.

³ Wormell v. Nason, 83 N. C. 32.

⁴ Drum v. Harrison (Ala.), 3 So. Rep. 15.

⁵ Hannah v. Carrington, 18 Ark. 85.

⁶ Hungate v. Reynolds, 72 Ill. 425.

of an unsecured claim he held against the mortgagor, and that to accomplish this end he evaded the exemption laws of the state, it was held that he was liable to the owner of the right of redemption for the damages caused by his seizure of the grain which was not needed to satisfy the mortgage. The claim of the owner of the equity is not in such case the subject of levy upon execution.¹ Chief Justice Gilfillan, delivering the judgment of the court, said: "Where the mortgagee forecloses under the power of sale in the mortgage, he stands, with respect to the mortgagor's rights in the property, in the position of a trustee, and is held to the exercise of good faith, and proper care, and diligence, to avoid any sacrifice of those rights not necessary to the reasonable enforcement of his own. Although the mortgage cover much more property than is necessary to his security, he may, under his mortgage, for his security, take possession of the whole; but where, without prejudice or great inconvenience to himself, he can satisfy his debt by a sale of part, he is, if the interests of the mortgagor require it, bound so to sell. If he unnecessarily sell the whole, and especially if he do so, not in good faith to satisfy his debt, but, as the court below in this case has found, in order to secure, by use of the power of sale, some further advantage,—to effect some purpose not contemplated by the mortgage,—he ought to be, and is, liable to the mortgagor for the damages sustained by him through such oppressive use of the power of sale. The claim of the mortgagor in such a case is not a debt which is the subject of levy. The levy by defendant upon the surplus in his hands, after the sale and satisfaction of the mortgage debt, did not affect the plaintiff's cause of action against him."

798. The sale should stop when sufficient property has been sold to satisfy the debt. If a mortgagee sell part of the mortgaged property by virtue of a power contained in the mortgage, and receive a sum sufficient to pay the mortgage debt with costs and expenses, his title to the mortgaged chattels remaining unsold is extinguished. The power to sell thereupon becomes *ipso facto* void, and cannot be exercised upon the remainder of the property. In equity the mortgagee, after satisfying the mortgage debt, becomes a trustee of the residue of the property, and must account for it to the mortgagor. A sale by the mortgagee of the

¹ Stromberg v. Lindberg, 25 Minn. 513.

residue is a conversion of the property, for which he is liable to the mortgagor in trover.¹

799. The mortgagee may, in the exercise of a reasonable discretion, adjourn a sale under the power, without doing so through the agency of a licensed auctioneer, or giving any new notice to the mortgagor.² "The right of a sheriff or other public officer to adjourn a sale, as being incident to the power to sell at auction, is settled in Maine, New York, and in Massachusetts. And if a public officer not appointed by the party and acting independently of him has such power, there is no reason why a trustee appointed by the party and acting under his express authority should not have it also. In both cases the reasons for its exercise are the same. It enables the seller to prevent the property from being sacrificed, and at the same time to prevent the loss of the labor and expense already incurred in giving notice of the sale."³

800. A mortgagee may sell upon credit although the mortgage itself provides that the property shall be sold for cash; for the provision is for the mortgagee's benefit, and he may waive it if he chooses to do so, and to take the risk of the credit given; and if he delivers the property to the purchaser at the foreclosure sale without requiring payment, he thereby waives the condition, and the title to the property vests in the purchaser.⁴

801. A sale under a power must be fair and *bonâ fide* to have the effect of extinguishing the equity of redemption. The mortgagee has no right, by any unfairness, to sacrifice the property, and deprive the mortgagor of a surplus over the debt which might arise from a sale properly conducted; or make him liable for a deficiency greater than there would be under a sale fairly conducted.⁵ But the mortgagor has no remedy at law, however wrongfully or unfairly the mortgagee may have acted in disposing of the property. His only remedy is a bill in equity to re-

¹ Charter v. Stevens, 3 Den. (N. Y.) 33; Mathews v. Fisk, 64 Me. 101, 107; Griswold v. Morse, 59 N. H. 211.

² Hosmer v. Sargent, 8 Allen (Mass.), 97; citing Richards v. Holmes, 18 How. 143.

See 2 Jones on Mortgages, §§ 1873, 1874.

³ Hosmer v. Sargent, *supra*, per Chapman, J.

⁴ Williams v. Hatch, 38 Ala. 338. See 2 Jones on Mortgages, § 1868.

⁵ Stoddard v. Denison, 38 How. (N. Y.) Pr. 296.

deem the property. So far as legal rights or obligations are concerned, a mortgagee may, after forfeiture, treat the property as his own, and deal with it as he may choose, without incurring any liability at law to any one.¹

A mortgagor who has by his own interference prevented a fair sale at a full price cannot have it set aside. Thus, if the mortgagee has made reasonable and fair efforts to sell the property at a fair price, and the mortgagor has by his acts, statements, and notices at the time of the sale, discouraged biddings, so that the property did not bring a full price, a court of equity will not set aside the sale on his application.²

Upon the foreclosure of a senior mortgage, and a sale of the property to the mortgagor at an unimpeached sale regularly made, the price paid will, in the absence of fraud be presumed to have conclusively fixed the value of the property, and a junior mortgagee cannot, by showing that the property did not sell for its full value, have the first mortgage satisfied to any greater extent than the price paid at such sale.³

802. Fraud and collusion, participated in by the mortgagee and purchaser, whereby the mortgaged property is sold for an inadequate price, is ground for invalidating the sale. Upon the issue whether there was such fraud and collusion, the mortgagor's assignee in bankruptcy in possession of the property may show by parol evidence that he had a valuable interest in the property, by proof of the real amount and character of the incumbrance to which it was subject.⁴

803. Sale under power in fraud of creditors. — A sale under a power may undoubtedly be valid although made at the request of the mortgagor, when in fact insolvent, with a view to keeping the property within his control. The sale would certainly be valid if it was simply the fair exercise of a legal right to collect an honest debt according to the terms of the mortgage. But a promissory note given to the mortgagee, to induce him to exer-

¹ *Stoddard v. Denison*, 38 How. (N. Y.) Pr. 296; *Warwick v. Hutchinson*, 45 N. J. L. 61.

² *Hall v. Ditson*, 55 How. (N. Y.) Pr. 19; *S. C.* 5 Abb. N. C. 198.

³ *Dehority v. Paxson* (Ind.), 17 N. E. Rep. 259; *Lee v. Fox*, 113 Ind. 98; 14 N. E. Rep. 889.

⁴ *Robinson v. Bliss*, 121 Mass. 428.

cise the power of sale for the purpose of delaying the mortgagor's creditors and preventing the property coming to their use, is fraudulent and void.¹

804. A mortgagee is probably not liable to a prior lien-holder for so exercising a legal right of sale as to reduce the value of the prior lien, and he is certainly not so liable if he merely exercises his legal right to foreclose his mortgage, and sell the interest of the mortgagor in the property; and the fact that he sells the property for its full value is insufficient to establish the conclusion that the sale was hostile to the prior lien-holder, and was inconsistent with his right to enforce his lien.²

805. An administrator is liable personally for a loss occasioned by an illegal and fraudulent sale of the mortgaged property made by him, although the sale was made through an agent, and the administrator was not himself guilty of any wilful default or fraud. The proceeding in such case is properly cognizable in equity, and a decree may be made in favor of the mortgagor for the difference between the mortgage debt and the value of the property illegally sold. Such recovery is instead of the property itself, which has been placed beyond reach through the illegal sale.³

806. The mortgagee cannot legally, by himself or agents, become a purchaser at his own sale under a power, for the purpose of barring the mortgagor's equity of redemption, unless specially authorized by the agreement of the parties. If he becomes a purchaser at his own sale either by himself or his agent, in the absence of a special agreement in the mortgage permitting it, such sale, to the extent of the purchase so made, is illegal, and does not bar the mortgagor of his equity of redemption; and if the mortgagee appropriates the property so purchased to his own use, he becomes liable to account for its value.⁴ A purchase of the prop-

¹ *Gordon v. Clapp*, 113 Mass. 335.

² *Hale v. Omaha Nat. Bank*, 64 N. Y. 550.

³ *Hungate v. Reynolds*, 72 Ill. 425.

⁴ *Korns v. Shaffer*, 27 Md. 83; *Waite v. Dennison*, 51 Ill. 319; *Hungate v. Reynolds*, *supra*; *Imboden v. Hunter*, 23 Ark.

622; *Webber v. Emerson*, 3 Colo. 248; *Cushing v. Seymour*, 30 Minn. 301; *Griswold v. Morse*, 59 N. H. 211. See 2 Jones on Mortgages, § 1876.

In Minnesota a mortgagee or pledgee of personal property, is authorized, fairly and in good faith, to purchase at any sale

erty by the mortgagee through a third person, who bids it off and transfers it to the mortgagee in pursuance of an arrangement previously made between them, is void equally with a purchase made directly by the mortgagee himself.¹ If he resell the property to another at a profit, the mortgagor may claim such profit.² If he sells to himself for an inadequate price, without the knowledge or consent of the owner, and thereafter holds and uses the property, the owner is not bound to accept a tender of the property at the price at which it was sold, but may treat the mortgagee as a wrong-doer, and recover the value of the property at the time of the illegal sale.³

But a purchase by a mortgagee at his own sale will not be set aside and a redemption allowed, when the sale was made with the mortgagor's consent, or in accordance with an understanding with him.⁴ If the mortgagee in such case in good faith becomes the purchaser, the mere fact that, after the purchase, he leaves the property with the mortgagor, to be cared for by him, does not subject it to levy and sale as the property of the mortgagor.⁵

If the mortgagee purchases under an arrangement between himself and the mortgagor, whereby the property still continues to belong to the mortgagor, the sale being colorable only, and the indebtedness secured by the mortgage is not paid, the mortgagor will still be liable thereon. But if, in such case, any of the property is levied on after such sale, under an execution against the mortgagee, and sold, the mortgage debt will be extinguished to the extent of the value of the property so levied on.⁶

If one of two mortgagees sell the property under a power of sale to one who purchases for the benefit of his co-mortgagee for an inadequate price, the mortgagor is not divested of his equity of redemption.⁷

of the property mortgaged or pledged. But the sale must be at public auction, upon like notice as is required in case of execution sales, and must be conducted by a sheriff or his deputy of the county, or by a constable of the town in which the property is situated. Laws 1885, ch. 171.

¹ *Pettibone v. Perkins*, 6 Wis. 616; *Phares v. Barbour*, 49 Ill. 370; *Alger v. Farley*, 19 Iowa, 518.

² *Cunningham v. Rogers*, 14 Ala. 147; *Griswold v. Morse*, 59 N. H. 211.

³ *Quick v. Van Auken*, 3 Pennypacker (Pa.), 469.

⁴ *Goodell v. Dewey*, 100 Ill. 308; *Gear v. Schrei*, 57 Iowa, 666; *Emmons v. Hawn*, 75 Ind. 356; *Syfers v. Bradley* (Ind.), 16 N. E. Rep. 805, 806; *Lee v. Fox* (Ind.), 14 N. E. Rep. 889.

⁵ *Emmons v. Hawn*, *supra*.

⁶ *Massey v. Hardin*, 81 Ill. 330.

⁷ *Alger v. Farley*, 19 Iowa, 518.

If the holder of one of several notes secured by a mortgage obtain possession of the property, he will hold it in trust for the owners of the note ; and if he purchase such property at a sale made by himself, he will be required to account for the fair value of it.¹

It matters not, in the application of this rule, that the sale was *bonâ fide* and for a fair price. The rule is not intended to remedy an actual wrong, but is intended to prevent the possibility of it.²

It is usual in power of sale mortgages to authorize the mortgagee to purchase at a sale under the power, and when this is the case there is no objection to such purchase.³

807. The same rule applies against a purchase of the property by the *cestui que trust* in a trust deed. His purchase of the property at a sale made by the trustee, unless authority for such purchase was conferred by the mortgage, does not bar the equity of redemption ; but the mortgagor may still redeem.⁴

808. In several states, however, the mortgagee of a chattel may purchase at public sale under a power in the mortgage, and hold the property for his own benefit free from any equity of redemption. This is the rule in New York.⁵ "The inconvenience and expense of a resort to the equity powers of courts to effect such foreclosures, which would be the probable consequence of denying to mortgagees the right to purchase, might be productive of greater oppression to mortgagors than could result from maintaining that right. Unfortunately, injustice cannot always be prevented by subjecting sales to the direct control of courts, and such control should not be assumed unless experience has demonstrated its necessity. The practice has prevailed in this state from a very early day of allowing mortgagees to become

¹ Beard v. Westerman, 32 Ohio St. 29.

² Imboden v. Hunter, 23 Ark. 622. See 2 Jones on Mortgages, § 1877.

³ See 2 Jones on Mortgages, § 1883.

⁴ Hannah v. Carrington, 18 Ark. 85.

⁵ Hall v. Ditson, 55 How. (N. Y.) Pr. 19; S. C. 5 Abb. N. C. 198; Olcott v. Tioga R. R. Co. 27 N. Y. 546, 566, per Selden, J., disposing of *dictum* to the con-

trary in Buffalo Steam Engine Works v. Sun Mut. Ins. Co. 17 N. Y. 401; and of Pulver v. Richardson, 3 T. & C. 436, decided upon the authority of the latter case; Hart v. Ten Eyck, 2 Johns. Ch. 62; Charter v. Stevens, 3 Den. 33; Patchin v. Pierce, 12 Wend. 61; Edmiston v. Brucker, 40 Hun, 256.

purchasers at sales conducted by them, under powers contained in mortgages of real estate; and that course is now sanctioned by statute. The long continuance of this practice, and the approbation which it has received from the legislature, afford strong evidence that no great inconvenience or injustice arises from it, and it is not perceived why a similar course, in sales under mortgages of chattels, would be attended with greater danger.”¹

In Indiana the mortgagee may buy at his own sale under a power, without the aid of a special stipulation for that purpose contained in the mortgage.²

In South Carolina a mortgagee of personalty may buy at his own sale under a power; but he holds such a trust relation under the mortgage as to throw the burden upon him of showing the fairness of his purchase.³ A horse was sold at public auction under a mortgage, and purchased by a disinterested third person, but he, failing to comply with the terms of sale, transferred his bid to the mortgagee, who took possession of the horse. There being no evidence to show that there was fraud in the sale, or that the price paid was inadequate, or that the mortgagee had resold at a profit, it was held that the sale was valid.⁴

So in Tennessee a mortgagee or creditor may purchase at a sale under a trust deed, and his title will be good if he act with fairness. His relation to the debtor imposes upon him the observance of fairness and good faith; and if he abuses the power which he holds over the trustee and over the sale, and becomes the pur-

¹ *Olcott v. Tioga R. R. Co.* 27 N. Y. 546, 566, per Selden, J.

² *Lee v. Fox* (Ind.), 14 N. E. Rep. 889, per Mitchell, C. J. “A mortgagee of personal property does not hold the legal title to the mortgaged property in trust for the mortgagor. He holds it in his own right, and is in no sense a trustee, except as to the surplus which may remain after paying the mortgage debt. The sale is for the purpose of extinguishing the mortgagor’s equity, and where the sale is fairly made, at public auction, in pursuance of a power, the mortgagor’s equity of redemption is effectually cut off, even though the mortgagee be the purchaser. A mortgagee of personal property is not within the rule which prohibits a trustee from

purchasing at his own sale, provided he acts fairly.” See, also, *Syfers v. Bradley* (Ind.), 16 N. E. Rep. 805; *Emmons v. Hawn*, 75 Ind. 356.

³ *Black v. Hair*, 2 Hill (S. C.) Eq. 622. The court say: “A creditor holding a mortgage security is a trustee to sell, not only for the benefit of the mortgagor, but for his own also. If he were not at liberty to bid, he would be deprived of the means of protecting his own interest as creditor. The mortgagor is at liberty to bid also, and has thus the means of entering into fair competition with the mortgagee, and compelling him to give a fair and full price.”

⁴ *Mills v. Williams*, 16 S. C. 593.

chaser, he will be regarded as holding the property only as a security for his debt, and subject to redemption.¹

In Wisconsin, in a recent case, the court, without determining whether the mortgagee may in any case purchase at a public sale under the mortgage, held that when a mortgagee makes a sale without the knowledge of the mortgagor, in violation of an agreement or understanding between them, and himself purchases the property at a grossly inadequate price, and renders no account of the sale to the mortgagor, the sale may be avoided at the suit of the latter.²

809. A purchase of the mortgaged property by a mortgagee at a public sale is valid at law, and is voidable only and not void in equity; and it is voidable only at the election of the mortgagor, or some person whose interests are affected by the purchase.³ The mortgagor may properly elect to treat the sale as valid, and to regard the sum for which the property sold above the debt secured as unpaid purchase money in the hands of the mortgagee.⁴ The mortgagor is the party most directly interested, and the validity of the sale cannot be impeached without his consent, or at least without giving him an opportunity of being heard. He must be made a party to the proceeding.⁵ The objection cannot be raised by a third party.⁶

810. A mortgagor may purchase at a foreclosure sale, or he may lawfully agree with another that the latter shall bid a certain sum for the property, and, if he becomes the purchaser, shall give the mortgagor an undivided interest therein, on his paying a portion of the purchase money. Such an arrangement is neither a fraud upon creditors, nor against public policy.⁷ The rule is the same where the sale is public, but not strictly a foreclosure sale, as is the case in New York.⁸

And so the creditors of a mortgagor may combine to purchase

¹ *Lyon v. Jones*, 6 Humph. (Tenn.) 533.

² *Boyd v. Beaudin*, 54 Wis. 193, 194.

³ *People v. Wiltshire*, 9 Bradw. (Ill.) 374; *Lee v. Fox* (Ind.), 14 N. E. Rep. 889.

⁴ *Davenport v. McChesney*, 86 N. Y. 242; *Lee v. Fox*, *supra*.

⁵ *Olcott v. Tioga R. R. Co.* 27 N. Y. 546.

⁶ *People v. Wiltshire*, *supra*.

⁷ *Bame v. Drew*, 4 Den. (N. Y.) 287. See 2 *Jones on Mortgages*, § 1887.

⁸ *Hall v. Ditson*, 55 How. (N. Y.) Pr.

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the mortgaged property at a foreclosure sale, and other creditors have no right to complain, inasmuch as they are not, by such combination, deprived of the right to bid at such sale.¹

If the mortgagor purchases at a foreclosure sale, and the mortgagee takes back a new mortgage for a part of the purchase money, though the sale and the taking of the new mortgage constitute but one transaction, the new mortgage will be subject to other liens existing upon the property at the time of the foreclosure, unless the mortgagee retains possession of the property until the new mortgage has been recorded.²

Under some circumstances the purchase of the property by the mortgagor, through the intervention of other parties, may have the same legal effect, as regards any existing second mortgage, as if the mortgagor had paid off the first mortgage without the intervention of a sale, so that the second mortgage will be advanced to the place of the first lien, as against a subsequent mortgage of the property.³

811. An irregular foreclosure sale operates as an assignment of the mortgage. A sixth mortgagee of the furniture and effects of a hotel obtained from the first four mortgagees separate bills of sale of such furniture and effects, three of them being made in pursuance of powers in such mortgages which conferred upon the mortgagees authority to sell upon default, upon such terms as they might think proper. The sixth mortgagee thereupon advertised and sold the property under a power of sale contained in his own mortgage for a sum less in amount than that secured by the four first mentioned mortgages. The fifth mortgagee of the same property, holding a mortgage prior in date to that under which such foreclosure sale was made, filed a bill in equity asking for an injunction to arrest the proceeds of the sale in the hands of the sixth mortgagee, and praying the same should be applied as far as necessary to the payment of his mortgage debt. It was held that even if the sales made under the first four mortgages were irregular, and not such as effectually to foreclose the mortgages, they had the effect of transferring to him the respective mortgage claims. The payment to the first four mort-

¹ Kropholler v. St. Paul, Minneapolis & Manitoba Ry. Co. 1 McCrary, 299; S. C. 2 Fed. Rep. 302.

² Blatchford v. Boyden (Ill.), 13 N. E. Rep. 801.

³ Kemmerer v. Bloom, 65 Iowa, 363.

gages of the consideration for their sales did not operate to extinguish the mortgages.¹

812. The mortgagor or those claiming under him should take immediate steps to set aside an irregular sale, and to redeem the property before the rights of innocent third parties have intervened; for such third parties buying without notice are not bound to inquire whether the foreclosure sale was irregular, and they obtain an unimpeachable title. The right to call the sale in question may be barred by delay.²

An application of the surplus proceeds of a sale made with the assent of the mortgagor to the satisfaction of an execution against him estops him from afterwards calling it in question.³

813. The mortgagee himself cannot call in question the regularity of a sale made at his instance, for the amount of his debt and costs, when neither the mortgagor nor any one interested under him calls it in question.⁴ If neither the mortgagor nor the purchaser has applied to set aside the sale, an agreement by a mortgagee with the purchaser at the sale, under a power to rescind the sale, does not have the effect of annulling the foreclosure effected by the sale, or of reinvesting the mortgagee with his original rights under the mortgage, so as to enable him to maintain a suit in equity for the reformation of the mortgage. If he could do this, it would be to put the mortgagor, and the persons succeeding to his rights, at the mercy of the mortgagee and the purchaser from him.⁵

814. A mere naked trespasser cannot question the validity of a foreclosure sale or of a sale under a power of a portion of the mortgaged property; nor can he complain of the application of the proceeds as between different debts of the mortgagor, nor ask an allowance or deduction of profits on a resale of the property after it has been purchased by the mortgagee at his own sale.⁶

¹ Walker v. Stone, 20 Md. 195. See 2 Jones on Mortgages, § 1902.

² Wylder v. Crane, 53 Ill. 490; People v. Wiltshire, 9 Bradw. (Ill.) 374. See 2 Jones on Mortgages, § 1922.

³ McCounell v. People, 71 Ill. 481; France v. Haynes, 67 Iowa, 139.

⁴ Massey v. Hardin, 81 Ill. 330; Williams v. Hatch, 38 Ala. 338.

⁵ Williams v. Hatch, *supra*.

⁶ Broughton v. Atchison, 52 Ala. 62.

815. A mortgagee has an implied license to enter the mortgagor's premises and take away the mortgaged goods, when he has foreclosed a mortgage of property in possession of the mortgagor by notice, sale, or otherwise, without taking possession of the property before such foreclosure. This is in accordance with the settled rule, that if the owner of real estate sells personal property situated on his premises, he thereby gives an implied irrevocable license to the owner of such personal property to enter on the premises for the purpose of taking and removing it therefrom. The right of entry upon the land is in aid of the title to the chattels. It makes no difference in the application of this doctrine that the mortgagor is only a tenant in common of the premises. If the premises are a dwelling-house, the door being open and no objection being made, the mortgagee has a right to enter and take away the mortgaged property without previous notice. In all cases he may enter in a peaceable and reasonable manner.¹

816. A foreclosure sale made in the state of the mortgagor's domicile, where the property is, and valid there, is valid everywhere. Thus, a *bond fide* purchaser of a chattel at a mortgagee's sale, under a mortgage executed and filed in New York, according to the statutes of that state, the chattel being there, and the mortgagor also residing there at the execution of the mortgage, and the mortgage being due, is protected in New Jersey against a previous *bond fide* purchaser from the mortgagor, the property having been brought into the latter state and there sold.²

817. A mortgagee becomes a trustee for the mortgagor as to the surplus received upon a sale in the exercise of a power;³ and the existence of this relation gives the mortgagor a right to the aid of a court of equity to obtain an account of the trust.⁴ But generally a resort to equity to obtain the surplus is neither necessary or proper. A suit at law is generally sufficient.⁵

Acceptance by the mortgagor of the surplus proceeds of the

¹ McNeal v. Emerson, 15 Gray (Mass.), 384.

² Parr v. Brady, 37 N. J. L. 201. And see Samuel v. Holladay, 1 Woolw. 400.

³ § 712; Flanders v. Thomas, 12 Wis. 410, 413; Vick v. Smith, 83 N. C. 80.

⁴ Korns v. Shaffer, 27 Md. 83.

⁵ 2 Jones on Mortgages, § 1940; Davenport v. McChesney, 86 N. Y. 242; King v. Van Vleck (N. Y.), 16 N. E. Rep. 547, affirming 40 Hun, 68.

sale estops him from claiming that the sale was invalid by reason of the mortgagee's collusion with the purchaser, or for other cause connected with the conduct of sale.¹

818. Under a judicial sale, or sale by virtue of a power, the property passes by delivery, and the purchase and ownership may be established by parol proof. The want of a bill of sale will not defeat the purchaser's title.²

819. No warranty of title is implied in a sale under a chattel mortgage, whether the sale be not made by virtue of statutory proceedings for foreclosure, or under a power of sale contained in the mortgage;³ or even if it be merely by virtue of the mortgagee's common law title and right to sell upon default, where such a mode of sale has not been superseded by the enactment of statutory provisions and is valid, as in New York. The sale in such case is itself notice to the public that the mortgagee is not selling his own title to the property, but the title he acquired through the mortgage. Therefore where a horse was sold at auction by a mortgagee, and a third person claiming the property afterwards recovered judgment against the purchaser for the value of the horse, in an action by the purchaser against the mortgagee to recover the amount of the judgment and the costs paid for defending the action, it was held that the purchaser was not entitled to recover.⁴

A person who stands by and allows a foreclosure sale to proceed without disclosing his claim to the property is estopped by his act from afterwards asserting that he had a claim to it at the time of the sale, if the claim be not of record, or such that the purchaser is affected with notice of it.⁵

819 *a*. A purchaser at a foreclosure sale obtains the mortgagee's title, together with such subsequent title as is cut off by the foreclosure. But if an unrecorded mortgage be foreclosed and the property sold, a junior mortgagee, holding a recorded mortgage without notice of the prior unrecorded mortgage,

¹ *France v. Haynes*, 67 Iowa, 139.

² *Conger v. Robinson*, 4 Sm. & M. (Miss.) 210.

³ *Harris v. Lynn*, 25 Kans. 281.

⁴ *Sheppard v. Earles*, 13 Hun (N. Y.), 651; *Harris v. Lynn*, *supra*.

⁵ *Miles v. Lefi* (Iowa, 1882), 14 N. W. Rep. 233.

is not affected by the sale. The property remains subject to such junior mortgage. All that the purchaser acquires by the sale is the mortgagor's equity of redemption subject to the recorded mortgage. The unrecorded mortgage being valid as against the mortgagor, the foreclosure sale under it passes all the interest that the mortgagee had and the mortgagor's equity of redemption.¹

820. Opening foreclosure.—It is no ground for opening a foreclosure legally perfected, that only a small amount of the mortgage debt remained unpaid when the mortgagee proceeded in good faith, and the mortgagor, with a full knowledge of the proceedings to foreclose, neglected to take any steps by which the foreclosure could be arrested and his rights ascertained.²

821. The mortgagee may himself waive or open a foreclosure either by an express agreement or by any unequivocal act on his part. A promise by the mortgagee after foreclosing his mortgage, made in the presence and with the consent of the mortgagor, to a purchaser of the property from the latter, that he would assign or discharge the mortgage on the payment of the amount due thereon, is a waiver of the foreclosure. Such purchaser, upon a tender of the amount due, is immediately entitled to the possession of the property, and upon a subsequent sale of it by the mortgagee, he may maintain an action against him for a conversion of the property.³ “Even in the case of a mortgage of real estate, a waiver or opening of a foreclosure may be proved, not only by an express agreement in writing, but by any other unequivocal act of the mortgagee. In the case of a mortgage of personal property, a distinct oral agreement of the mortgagee must be allowed the same effect.”⁴

A judgment for the full amount of the mortgage debt obtained by the mortgagee against the mortgagor, after a foreclosure without a sale, opens the foreclosure, because a foreclosure necessarily satisfies the mortgage debt to some extent, and therefore to take judgment for the full amount of the debt is a disavowal of foreclosure.⁵

¹ *Kelly v. Shepherd* (Ga.), 4 S. E. Rep. 880.

² *Burtis v. Bradford*, 122 Mass. 129.

³ *Phelps v. Hendrick*, 105 Mass. 106.

⁴ *Phelps v. Hendrick*, *supra*, per Gray, J.

⁵ *Clarke v. Robinson*, 15 R. I. 231; 13 Atl. Rep. 124. See § 693.

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